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A HISTORY OF ENGLISH LAW

BY
Sear e
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To say truth, although it is not necessary for counsel to know what the history of a point is, but to know how it now stands resolved, yet it is a wonderful accomplishment, and, without it, a lawyer cannot be accounted learned in the law. ROGER NORTH

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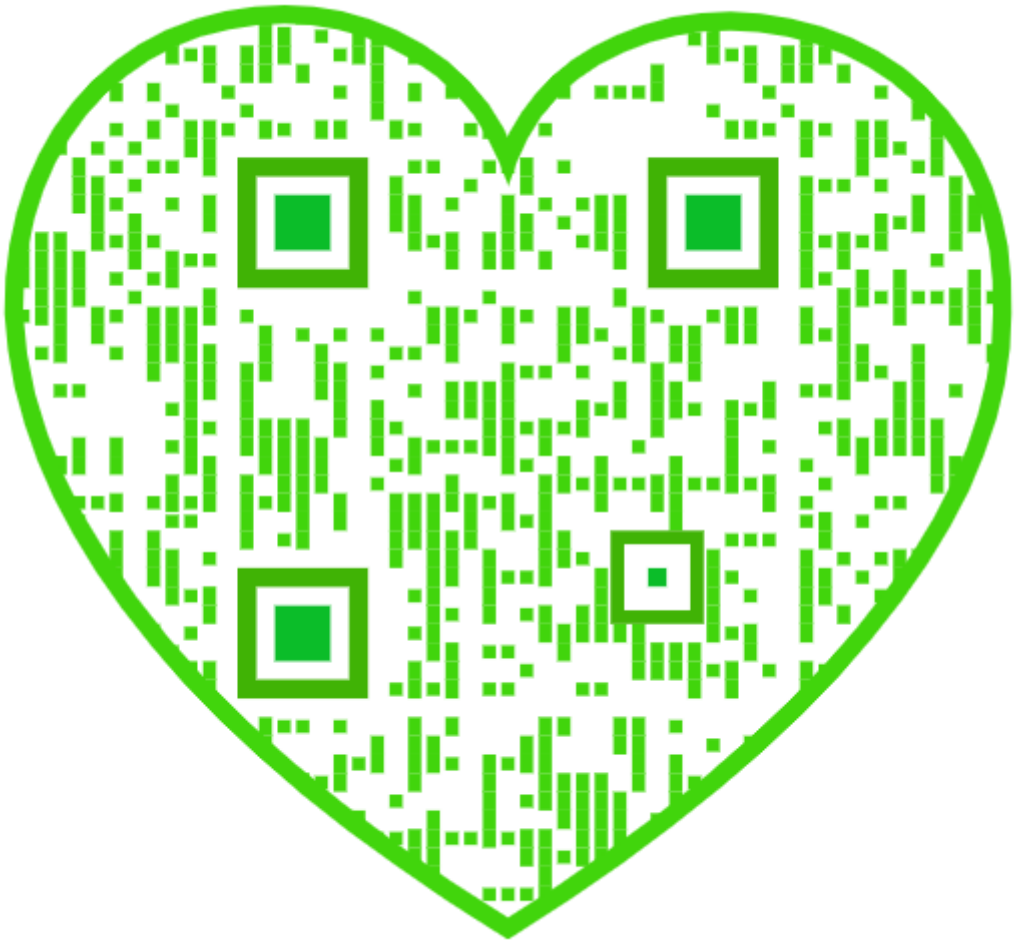

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TO

THE RIGHT HONOURABLE LORD WRIGHT OF DURLEY

LORD OF APPEAL IN ORDINARY

IN MEMORY OF THE DAYS WHEN HE AND THE AUTHOR

BOTH TAUGHT LAW

AT

LONDON UNIVERSITY

THIS WORK

IS

WITH HIS PERMISSION

DEDICATED

BY

HIS FORMER COLLEAGUE AND OLD FRIEND

PREFACE

IN the first and introductory volume, which contains Book I of this History, I have related the history of the Judicial System down to the passing of the Judicature Act in 1875. In the eight succeeding volumes, which contain Books II-IV, I have described the sources and influences which shaped the development of English law down to 1700, and I have related both the history of English public law during the same period, and also the history of the principal doctrines of English private law, in some cases to 1700 and in others down to the nineteenth century. These three succeeding volumes begin Book V, the last Book of this History, in which I propose to relate the history of English law from 1700 to 1875. They begin Part I of this Book, and they relate the history of public law, and of the sources and influences which shaped the development of English law, during the eighteenth century. If I continue to have sufficient health and leisure, I hope in a succeeding volume to complete Part I of this Book, and in Part II to complete the History in two more volumes by giving some account of the history of those doctrines of English law with which I have not fully dealt in the preceding volumes.

It may be thought that I have dealt with the legal history of the eighteenth century at too great a length. But there are several reasons why I have found it necessary to fill three bulky volumes. In the first place, this is the first complete legal history of the eighteenth century which has ever been written. In the second place, to make that history intelligible it has been necessary to deal somewhat more fully than in the preceding periods with the political background.

The Parliamentary history of this period, the history of the beginnings of the system of Cabinet government, the history and effects of the Act of Union with Scotland, the legislation as to Ireland, the beginnings of colonial constitutional law, and the legislation as to India, would not be intelligible without a full account of that background. In the third place, the growth of the colonies and the Indian Empire, the extension of the commerce and industry of Great Britain, and the demands of a more complex and a more civilized society, necessarily increase the complexity of the law both enacted and unenacted, and so make a more lengthy treatment of its history necessary. In the sphere of local government, for instance, and in the statutes relating to commerce and industry, the complexity caused by these demands is very obvious. Lastly, at several points, for instance, in my treatment of beginnings of bodies of local government law, of the royal prerogative, of the departments of the executive government, of the machinery of legislation, of private Acts of Parliament, of the legal profession, of case law, —I have found it necessary to go beyond the eighteenth century and to carry down the history of these topics to the nineteenth century. For this reason I think it will be possible to relate the rest of the history of public law and of the sources and influences which shaped the development of the law in a single volume.

I have to thank Dr. Hazel, the Principal of Jesus College, for his help in reading the proofs and for his suggestions and criticisms, and my son Mr. R. W. G. Holdsworth, Stowell Fellow and Tutor of University College, Oxford, for similar help. The indices and the lists of cases and statutes have been entrusted to the skilled hands of Mr. E. Potton, who prepared the consolidated index and the lists of cases and statutes to the preceding nine volumes.

All Souls College,
January, 1937.

PLAN OF THE HISTORY

(Vol. I.) BOOK I.—The Judicial System: Introduction. Chap. I. Origins. Chap. II. The Decline of the Old Local Courts and the Rise of the New County Courts. Chap. III. The System of Common Law Jurisdiction. Chap. IV. The House of Lords. Chap. V. The Chancery. Chap. VI. The Council. Chap. VII. Courts of a Special Jurisdiction. Chap. VIII. The Reconstruction of the Judicial System.

(Vol. II.) BOOK II. (449-1066)—Anglo-Saxon Antiquities: Introduction. Part I. Sources and General Development. Part II. The Rules of Law. § 1 The Ranks of the People; § 2 Criminal Law; § 3 The Law of Property; § 4 Family Law; § 5 Self-help; § 6 Procedure.

BOOK III. (1066-1485)—The Mediæval Common Law: Introduction. Part I. Sources and General Development: Chap. I. The Intellectual, Political, and Legal Ideas of the Middle Ages. Chap. II. The Norman Conquest to Magna Carta. Chap. III. The Reign of Henry III. Chap. IV. The Reign of Edward I. Chap. V. The Fourteenth and Fifteenth Centuries. (Vol. III.) Part II. The Rules of Law: Chap. I. The Land Law: § 1 The Real Actions; § 2 Free Tenure, Unfree Tenure, and Chattels Real; § 3 The Free Tenures and Their Incidents; § 4 The Power of Alienation; § 5 Seisin; § 6 Estates; § 7 Incorporeal Things; § 8 Inheritance; § 9 Curtesy and Dower; § 10 Unfree Tenure; § 11 The Term of Years; § 12 The Modes and Forms of Conveyance; § 13 Special Customs. Chap. II. Crime and Tort: § 1 Self-help; § 2 Treason; § 3 Benefit of Clergy, and Sanctuary and Abjuration; § 4 Principal and Accessory; § 5 Offences Against the Person; § 6 Possession and Ownership of Chattels; § 7 Wrongs to Property; § 8 The Principles of Liability; § 9 Lines of Future Development. Chap. III. Contract and Quasi-Contract. Chap. IV. Status: § 1 The King; § 2 The Incorporate Person; § 3 The Villeins; § 4 The Infant; § 5 The Married Woman. Chap. V. Succession to Chattels: § 1 The Last Will; § 2 Restrictions on Testation and Intestate Succession; § 3 The Representation of the Deceased. Chap. VI. Procedure and Pleading: § 1 The Criminal Law; § 2 The Civil Law.

(Vol. IV.) BOOK IV. (1485-1700)—The Common Law and its Rivals: Introduction. Part I. Sources and General Development: Chap. I. The Sixteenth Century at Home and Abroad. Chap. II. English Law in the Sixteenth and Early Seventeenth Centuries: The Enacted Law. (Vol. V.) Chap. III. English Law in the Sixteenth and Early Seventeenth Centuries: Developments Outside the Sphere of the Common Law—International, Maritime, and Commercial Law. Chap. IV. English Law in the Sixteenth and Early Seventeenth Centuries: Developments Outside the Sphere of the Common Law—Law Administered by the Star Chamber and the Chancery. Chap. V. English Law in the Sixteenth and Early Seventeenth Centuries: The Development of the Common Law. (Vol. VI.) Chap. VI. The

Public Law of the Seventeenth Century. CHAP. VII. The Latter Half of the Seventeenth Century: The Enacted Law. CHAP. VIII. The Latter Half of the Seventeenth Century: The Professional Development of the Law.

(VOL. VII.) Part II. The Rules of Law. CHAP. I. The Land Law: § 1 The Action of Ejectment; § 2 Seisin Possession and Ownership; § 3 Contingent Remainders; § 4 Executory Interests; § 5 Powers of Appointment; § 6 The Rules against Perpetuities; § 7 Landlord and Tenant; § 8 Copyholds; § 9 Incorporeal Things; § 10 Conveyancing; § 11 The Interpretation of Conveyances. CHAP. II. Chattels Personal: § 1 The Action of Trover and Conversion; § 2 The Ownership and Possession of Chattels; § 3 Choses in Action.

(VOL. VIII.) CHAP. III. Contract and Quasi-Contract: § 1 The Doctrine of Consideration; § 2 The Invalidity, the Enforcement, and the Discharge of Contract; § 3 Quasi-Contract. CHAP. IV. The Law Merchant. I.—Commercial Law: § 1 Usury and the Usury Laws; § 2 Negotiable Instruments; § 3 Banking; § 4 Commercial Societies; § 5 Agency; § 6 Bankruptcy. II.—Maritime Law. III.—Insurance. CHAP. V. Crime and Tort. Lines of Development. § 1 Constructive Treason and Other Cognate Offences; § 2 Defamation; § 3 Conspiracy, Malicious Prosecution, and Maintenance; § 4 Legal Doctrines resulting from Laws against Religious Nonconformity; § 5 Lines of Future Development; § 6 The Principles of Liability.

(VOL. IX.) CHAP. VI. Status: § 1 The King and Remedies against the Crown; § 2 The Incorporate Person; § 3 British Subjects and Aliens. CHAP. VII. Evidence, Procedure, and Pleading: § 1 Evidence; § 2 Common Law Procedure; § 3 Equity Procedure.

(VOL. X.) BOOK V. (1701-1875)—THE CENTURIES OF SETTLEMENT AND REFORM: Introduction. Part I. Sources and General Development; CHAP. I. The Eighteenth Century. Public Law.

(VOL. XI.) The Eighteenth Century. Public Law (*continued*). CHAP. II. The Eighteenth Century. The Enacted Law.

(VOL. XII.) CHAP. III. The Eighteenth Century. The Professional Development of the Law.

CONTENTS

PAGE

PREFACE vii
PLAN OF THE HISTORY ix
LIST OF CASES xxiii
LIST OF STATUTES xxxvii

BOOK V (*Continued*)

PART I (*Continued*)

SOURCES AND GENERAL DEVELOPMENT (*Continued*)

CHAPTER III

THE EIGHTEENTH CENTURY (*Continued*)

The Professional Development of the Law

The importance of this professional development 3-4

I. THE LEGAL PROFESSION 4-101
The Ranks of the Legal Profession 4-13
The order of precedence 4
Numbers of different classes of practitioners 4
Reasons for the order of precedence 5-6
The place of the civilians 6-7
The King's advocate and the attorney and solicitor-general . 7
Advocates and barristers 8
The attornies, solicitors, and proctors 8-9
The King's representatives in the courts 9
King's counsel and King's serjeants have ceased to represent him 10
Representatives of the Queen, Duke of Lancaster, and Prince of Wales 10
Standing counsel to the Board of Trade 10-11
Other government departments get representatives in the courts 11
The Treasury solicitor 11-12
Other departments with solicitors 12
The King's proctor 12
Why these departments were represented by solicitors . . 13
In the nineteenth century absorbed by the Treasury solicitor . 13
The organization and discipline of the legal profession . . . 14-77
The Serjeants' Inns 14-15
The Inns of Court and Chancery 15-46
The Inns of Court 15-40
Their changed position in the eighteenth century . . 15-16
They cease to be collegiate educational bodies . . . 16

PAGE

Cessation of revels and feasts 16-17
The defects and merits of the Inns in the eighteenth century 17
Their organization and the discipline of their members . 18-33
The benchers are the governing body 18-20
Freedom of election to the bench 20
Associates of the bench and honorary benchers . . 20-21
Position of the Treasurer 21-22
The call to the bar 22
Dispensations with terms 22-23
The Inns standardize conditions of call . . . 23-24
Power to dispense with conditions 24-25
The ceremonial of call 25
Rules as to admission 26-27
Discipline 27-28
Appeals from the benchers to the judges as visitors . 28-30
No appeal from a refusal to admit 30-31
Reforms suggested by the common law commissioners 31-32
The changes in fact made 32-33
Their management by their benchers and officers . . 33-40
The fabric of the Inns 33-35
Their machinery of government 35-36
Their improved financial position 36-37
Their immunities and privileges 37-38
Preservation of their amenities 38
Dinners 38-39
Their activities—feasts and grand days . . . 39-40
The Inns of Chancery 40-46
Relations to the Inns of Court 40-42
Effect on them of the cessation of legal education . 42-43
Their membership 43
Their failure to organize the attornies and solicitors . 43-44
The ultimate fate of the Inns and their property . . 44-46
The merits and defects of the eighteenth-century benchers 46
Doctors' Commons 46-51
Origins 46-47
History of the site and buildings 47-48
Incorporation of the College of Doctors 48-49
Surrender of its charter and division of its property . . 49
Character of the buildings 49-50
The work of the Doctors 50-51
The Attornies and Solicitors 51-75
One class in the eighteenth century 51
Want of a professional organization—how it was met . 52
Regulations of the Legislature and the Courts . . 52-62
Seventeenth-century statutes 52-53
Seventeenth and eighteenth-century rules made by the Courts 53
The need for more stringent regulations . . . 53-54
The Act of 1729 54-56
The Acts of 1739 and 1749 56
Admission of those who had served as clerks to the officials of the Courts 56-58
Disciplinary rules enforced by the Courts . . . 58-59
Rules as to admission and professional conduct . . 59-60
Rules as to dealings with clients 60-61
Laxness of discipline—its causes 61-62
The Work of the Society of Gentlemen Practisers . . 63-75
Its origin and records 63
Its organization 63-64
A proposed corporation of attornies 64-66
A new Society and its amalgamation with the old the Incorporated Law Society 66

PAGE

The activities of the Society—discipline . . . 66-67
Safeguarding interests of its members . . . 67-72
Some instances 67-69
The contest with the Scriveners' Company . 69-72
Promotion of reforms in the law 72-73
Relations between solicitors and barristers . . 73-74
Miscellaneous activities 74-75
The Proctors 75-77
Regulations of the Archbishop of Canterbury . . . 76
Regulations of the Courts 76-77
The Education of the Lawyers 77-101
Absence of legal education and its effects 77-78
The decadence of legal education 78-91
The disappearance of readings and exercises . . . 78-80
Attempts to provide lectures 80-82
Projects for education of attornies 82-83
The advocates—education at Oxford and Cambridge . 83-85
How the students educated themselves 85-88
These methods made practitioners not lawyers . . 88-89
Give rise to the idea that the systematic teaching of law is useless 89
Bad effects on legal literature 89
Knowledge of law is confined to the legal profession . 90
Bad effects on the government of the state . . . 90-91
Murray's suggestion to Blackstone 91
Blackstone's attempt to revive legal education . . . 91-101
Blackstone's lectures at Oxford 91-92
The founding of the Vinerian chair of English law . . 92-95
Blackstone's plea for the teaching of English law at Oxford 96-99
Reasons why this was desirable 96-97
Defects of the existing methods of legal education . 97
His suggested course of instruction 98
Advantages of such a system of education . . 98-99
The effects of Blackstone's plea in America . . . 99-100
Slow recognition of his ideas in England . . . 100-101

II. THE REPORTS, ABRIDGMENTS, DICTIONARIES, AND INDICES 101-178
The Reports 102-162
Character of the reports of the eighteenth century . . . 102-103
Differences between the reports of the seventeenth and eighteenth centuries 103-117
Extension of practice of reporting to other courts . . 103-107
Chancery reports 103-104
House of Lords' reports 104-105
Admiralty, Prize, Ecclesiastical, and Privy Council reports 105-107
The beginnings of separate series of reports 107-110
Why originally there was no clear division between the different series of reports 107-108
Quarter Sessions cases 108
Crown cases 109
Practice cases 109
Election cases 109
Nisi Prius cases 109-110
The style of the reports and rules of reporting . . . 110-115
Varieties of style 110
Burrow and his rules of reporting 110-112
Burrow and the judges' imprimatur 112-113
Cowper's reports 113
Douglas and his rules of reporting 113-114
Differences in style between common law and equity reports 114-115

PAGE

The beginning of the publication of contemporaneous reports . 116-117
The authorized reports 117
The lists of the eighteenth-century reports 117-126
The State Trials 127-130
The editions of these Trials 127-128
The editors of these editions 128-130
Their authority and value 130
Some eighteenth-century reports and reporters . . . 130-146
Common law reports of lawyers who became judges . 130-137
Comyns 130
Strange 130-132
Willes 132-133
Parker 133
William Blackstone 133-134
Kenyon 134
Wilmot 134-135
Bosanquet and Puller 135
East 135
Anstruther 135
Foster 135-137
The reports of other lawyers 137-145
Bunbury 137-138
Wilson 138
Barnardiston 138
FitzGibbon 138-139
Kelying, Andrew, Lofft 139-140
Henry Blackstone 140
Gilbert 140-141
Ridgeway 141-142
Dickens 142
Peere Williams 142
Moseley, and Cases t. Talbot 142-143
Ambler and Atkyns 143
Vesey Senior and Junior 143-144
Eden 144
Cox 144
Lee, Robinson, and Haggard 145
The improvement in the reports 145
Encouragement given by Lord Eldon 145-146
The modern theory of the authority of decided cases . 146-162
The modern theory 146-147
Period of the Year Books 147
Effect of the rise of written pleadings 147-148
The views of Bacon, Coke, Vaughan, and Hale . . 148-149
The views of Wood, Hardwicke, and Blackstone . . 149-150
The views of Mansfield, Eldon, and Tenterden . . 150
The reservations to the modern theory . . . 150
The principle on which they rest 150-151
Power to disregard cases which are contrary to principle . 151-153
Power to disregard an inaccurate report 154
The comparative authority of cases in different courts . 155-156
Authority only attaches to the principles laid down . . 156-157
The merits of this method of developing the law . . 157
Its dependence on a learned bench 157-158
Austin's and Bentham's criticisms 158
Modern criticisms—how far justified 158-161
Dangers of criticism based on a comparison with foreign law 161-162
The Abridgments 162-175
Rolle, Hughes, Nelson, Jacob 162
D'Anvers 162-163
Viner 163-168

PAGE

His career 164
The making of his Abridgment 164-165
How it was published 165-167
Its measure of success 167-168
The introduction of a new method of making Abridgments . 168
Comyns' Digest 168-169
Bacon's Abridgment—its debt to Gilbert 169-170
Its success 170
Petersdorff's Abridgment 171
Need for indices to these Abridgments 171
Abridgments of equity cases 171-172
The merits of the alphabetical arrangement of a legal system . 172-175
The Law Dictionaries and Indices 175-178
Termes de la Ley, Cowell, Spelman, Blount 175-176
Giles Jacob's dictionary 176
Cunningham and Marriott's dictionaries 177
Law-French and Law-Latin vocabularies 177
The mediæval Latin Word-List 177
Indices to cases, Abridgments, and statutes 178

III. EQUITY 178-330
Development of equity in the eighteenth century 179
The Literature of Equity 179-193
Books upon practice and pleading 179-185
Brown's *Praxis* 179-180
Bohun's *Cursus Cancellariae* 180
The Practical Register in Chancery 180-181
The Accomplish'd Practiser 181
Historical Treatise of a Suit in Equity 181-182
Gilbert's *History and Practice* 182-183
Mitford and his book on equity pleading . . . 183-185
Books on the position of the Master of Rolls . . . 185
Books upon the principles of equity 186-193
Gilbert's *Lex Praetoria* 186-187
Gilbert's *Uses and Trusts* 187
Gilbert's *Devises and Wills* 187-188
Francis's *Maxims* 188
Older books of maxims 188-189
Grounds and Rudiments of Law and Equity . . . 189
Broom's *Legal Maxims* 189-190
The importance of the maxims of equity . . . 190-191
Ballow and his *Treatise of Equity* 191-192
Fonblanque's edition 192-193
The Chancellors and Masters of the Rolls (1700-1737) . . 193-237
Wright L.K. 194-195
Cowper L.C. 195-201
His career 195-198
His decisions 198-201
Harcourt L.C. 201-203
His career 201-202
His decisions 202-203
Macclesfield L.C. 204-210
His career 204-206
His character 206-207
His decisions as Chief Justice 207-208
His decisions as Chancellor 208-210
King L.K. 210-214
His career 210-211
His decisions 210-212
His influence on legislation and defects as a Chancellor . 213-214

PAGE

Talbot L.C. 214-218
His career 214-216
His legal ability 216
His decisions 216-218
Trevor M.R. 218-219
Jekyll M.R. 219-222
Character of equitable developments 222-223
The basis of equity 223-225
Principles deduced from this basis 225-227
How far equity can modify the law 227
Growth of established rules 227-228
Equitable doctrines are still loose and vague 228-233
Flexibility of equitable doctrines 233-236
Growth of fixed bodies of doctrine 236-237
Lord Hardwicke and his contribution to Equity 237-297
Hardwicke's qualities as statesman and lawyer . . . 237-238
Hardwicke's career 238-254
His legal education and rapid progress 238-240
His career as law officer 240-242
Chief Justice of the King's Bench 242-243
His influence in the House of Lords 243-244
Becomes Chancellor 244-245
Resignation and subsequent career 245
His Masters of the Rolls 245-246
His good fortune 246-247
His character as a minister 247-248
His character as a legal statesman 248-252
His character as a lawyer 252-254
Hardwicke's intellectual qualities 254-257
His industry and his orderly mind 254-256
His knowledge of other systems of law 256
His knowledge of English law 256-257
Hardwicke's contribution to Equity 257-297
His contribution to substantive principles . . . 258-285
The leading characteristics of equity . . . 258-265
How far equity follows law 258-260
More progressive than common law . . . 260
Adherence to principle 261-262
The place of conscience 262-263
Effect of its jurisdiction *in personam* . . . 264-265
Some leading principles of equity 265-270
Equitable estates 265-266
Nature of equitable ownership 266-267
Position of volunteers 267-268
Regards substance rather than form . . . 268
Doctrines originating in the construction of documents 268-270
Possibilities and choses in action 270
Bodies of equitable doctrine 270-281
Trusts 270-273
Family law 273-276
Specific Performance 276-277
Mortgages 277-279
Administration of Assets 279-280
Evidence 280-281
The province of Equity 281-284
Bankruptcy 281-282
Commercial Cases 282-283
Copyright and trade marks 283-284
Miscellaneous cases 284
Hardwicke's achievement in settling the principles of Equity 284-285

PAGE

Hardwicke's attempts to reform procedure and practice . 285-296
The defects of equity procedure 285-286
Attempts at legislative reforms 286-288
Their inadequacy 289
Illustrations of the dilatory character of the procedure 289-291
The difficulty of making reforms 291-292
Hardwicke's aversion to change 292-293
His lack of leisure 293
Effects of Hardwicke's inaction 293-294
Hardwicke's and Eldon's responsibility compared . 294-295
Growing deterioration of the procedure of equity . 295-296
The effects of Hardwicke's work 296
The end of the formative period in the history of equity . . 296-297
The Chancellors and Masters of the Rolls (1756-1792) . . 297-329
Northington L.C. 297-304
His career 297-299
His character as a lawyer 299-300
His decisions 300-301
Burgess v. Wheate—his and Mansfield's views . . 301-303
Significance of this difference 304
Camden L.C. 304-310
His career 304-308
His decisions in Chancery and the Privy Council . . 308-310
Charles Yorke 310-313
Bathurst L.C. 313-314
Thurlow L.C. 314-327
His early career 314-317
Law officer 317-318
Chancellor 318-320
Later life 320-321
His contemporary reputation 321-322
His defects 322-323
His decisions 323-324
The inventor of the restraint on anticipation . . . 325-326
Other cases 326-327
The verdict of posterity 327
The Masters of the Rolls—Sewell, Kenyon, and Arden . . 327-329
The relation of equity to the law 329-330

IV. THE COMMON LAW 330-583
The Literature of the Common Law 331-431
Its character 331-332
Public Law 332-350
Local government 332-339
Central government 339-348
The constitution and constitutional law . . . 339-345
Particular topics 345-348
Colonial government 348-350
Civil Procedure and Pleading 350-361
Procedure in general 350-354
Special topics 354-356
Pleading 356-359
Attorneys' and solicitors' practice books . . . 359-361
Criminal Law and Procedure 361-365
Hawkins' *Pleas of the Crown* 361-362
Other books 362-363
Books on procedure 363
Eden's *Principles of Penal Law* 364-365
Evidence 365-367
The Land Law and Conveyancing 367-383
Booth's *Real Actions* 367-368
Gilbert's and Wright's Tenures 368-370

PAGE

Other books by Gilbert 370-371
Hargrave and Butler's edition of Coke upon Littleton . 372-373
Fearne's *Contingent Remainders* 373-375
Precedents in Conveyancing 375-376
Precedents in and the theory of conveyancing . . 376-377
Fines and recoveries 377-378
Registration of conveyances 378-380
Copyholds 380-381
Mortgages 381-382
Powers of appointment 382
Devises 383
Landlord and Tenant 383
Commercial Law 383-391
The older books for both merchants and lawyers . . 384-387
Books written by lawyers for lawyers 387-391
Tort and Contract 391-392
Special branches of the Law 392-402
Arbitration 392-393
Bailments 393-394
Damages 394
Game Laws 394-395
Intestate succession 395-396
Wills 396
Libel 396-397
Master and Servant 397
Pawnbrokers, usury, and life annuities 397-398
Simony 398
Status 398-400
The Statutes 400-402
Legal History 402-417
Anglo-Saxon antiquities and Anglo-Norman law . . 403-404
Madox 404-408
The Antiquarian Society 408-409
Rymer's *Fœdera* 409
The Rolls of Parliament 409
Hargrave 410-411
Histories of particular topics 411-412
Reeves 412-415
The historical tradition of English lawyers and its effects . 415-417
Students' Books and Legal Theory 417-429
Books on English Law 418-425
Wood 418-420
Wooddeson 420-421
Wynne 421-424
Other books 424-425
Books on the civil and canon law 425-427
Books on legal theory 427-429
Improvement in the character of legal literature . . . 429-431
The Chief Justices and other Lawyers (1700-1756) . . . 431-462
Hardwicke C.J. 432
Pratt C.J. 432-437
His career 432-434
His decisions 434-437
Lord Raymond C.J. 437-442
His career 437
His reports and decisions 437-442
Lee C.J. 442-446
His career 442-443
His decisions 443-446
Ryder C.J. 446-447

PAGE

The Chief Justices of the Common Pleas 447-448
Part played by that court in developing the common law . 448-452
The complexity of its procedure 452-453
Old and new law 453-455
The Chief Barons of the Exchequer 455-456
Revenue cases 456-458
Equity cases 458
Common law cases 458-459
Other famous lawyers of this period 459-461
Character of this period of legal development . . . 461-462
Coming changes 462-463
Lord Mansfield and the Puisne Judges of his Court . . . 464-560
Mansfield's career and character 464-478
Early life and marriage 464-466
His rapid rise at the bar 466-467
Qualities as lawyer and advocate 467-468
Law officer and member of Parliament 468-471
Accused of being a Jacobite 471-472
Becomes Chief Justice 472-473
A leader in the House of Lords 473-475
His achievement as Chief Justice 475-476
Resignation and death 476-477
The effectiveness of his work 477-478
The puisne judges of the court of King's Bench . . . 478-493
Foster 478
Denison 478-479
Wilmot 479-482
Yates 482-484
Aston 484-485
Hewitt 485
Grose 485
Willes 486
Ashhurst 486-488
Buller 488-492
The contribution of Mansfield and the King's Bench to legal development 493-549
Procedure and pleading 493-503
Evidence 504-510
Constitutional law 510-513
Criminal law 513-515
The land law 515-517
Contract 517-521
Tort 521-524
Commercial and maritime law 524-542
Characteristics of these branches of law . . . 524-525
Why Mansfield was able to settle their principles . 525-526
Difficulties in settling them 526-529
Commercial law 529-532
Maritime law 532-536
Marine and other Insurances 536-541
Bankruptcy 541-542
Quasi-contract 542-547
Mansfield's view of the scope of *indebitatus assumpsit* 542-543
Why it was rejected 543-545
Effects of this rejection 545-547
Connected with his views as to the relations of law and equity 547-548
Equitable principles introduced into the common law . 548-549
Mansfield's influence on the future development of the common law 549-560
His views as to the need for reform and how it should be effected 549-550

PAGE

The eighteenth century's point of view on this matter . 550-551
His reverence for the law 551-552
His attempt to reform the law by his decisions . . 552-555
Where such reform is possible and where not . . . 555-556
Influenced by Scots law and equity 556-558
The criticism of Bentham and others 558-559
How far it is justified 559-560
His historical position 560
Mansfield's Contemporaries and Successors 560-583
Fletcher Norton 560-562
John Dunning 562-563
James Wallace 563-564
Smythe and Skynner C.BB. 564-565
James Eyre 565-566
His decisions 566-568
De Grey 568-569
Wedderburn 569-574
His character as a common lawyer 574-576
Kenyon 576-583
His career 576-579
His decisions 579-583

V. THE RELATIONS BETWEEN LAW AND EQUITY . . 583-605
Speculation as to those relations. 583-584
The two schools of thought 584-585
The difference between them illustrated by *Burgess v. Wheate* . 585-588
The views of Mansfield and Blackstone 588-594
Cases illustrating Mansfield's views 588-589
Arguments for them 589-590
Blackstone's account of equity 590-591
The two senses in which he used the term "equity" . . 591-593
His misleading account of equity and its relation to law . 593-594
Why Mansfield's and Blackstone's views were rejected . . . 595-601
Substantial differences ignored 595
Fixed character of the two systems 595-596
Why amalgamation was not possible 596-599
Why continued separation was desirable 599-601
The effects of this rejection 601-605
The partnership between law and equity 601-602
Conflicts avoided 602
Effect of the nineteenth-century reforms 602-603
Comparison of Mansfield's views and the Judicature Acts . 603-604
Relations of law and equity since those Acts 604-605

VI. THE SPHERE OF THE CIVILIANS' PRACTICE . . 605-702
The position of the civilians 605
The sphere of their practice 605-606
The Civilian Literature 606-646
Ecclesiastical Law 607-625
Gibson's books 607-608
His Codex 608-610
Ayliffe and his *Parergon* 610-612
Burn's Ecclesiastical Law 612-613
Jura Ecclesiastica 613-614
Practice and Procedure 614-619
Testamentary cases 619-620
Tithes 620-621
Ecclesiastical offences 621-622
Summaries of ecclesiastical law 622-624
Livings and their value 624
Historical books 624-625
Admiralty and Prize Law 626-629

PAGE

Exton's book 626-627
Molloy's book 627
Laws of the Admiralty 627-628
Clerke's Praxis 628-629
Martial Law 629-630
International Law 630-639
Absence of English writers 630-631
The two schools of international law 631-635
Pufendorf, Wolff, and Vattel 631-634
Bynkershoek, Moser, and De Martens . . . 634-635
The growth of modern international law 635-637
The work done by English writers 637-639
Roman law and Jurisprudence 639-646
Why these studies owe most to the civilians . . . 639-640
Robert Wiseman's book 640
Students' books on Roman law 640-641
Ayliffe's *New Pandect* 641-642
Books on jurisprudence 642-643
Taylor, Bever, and Bellers 644-646
Some eminent civilians 646-676
The civilians were a family party 646-647
Leoline Jenkins 647-661
His career 647-651
His views on constitutional law 651-652
His views on Roman law 652
Work as diplomat and judge of the Prize court . . 653-656
Work as judge of the court of Admiralty . . . 656-658
Work in the ecclesiastical courts 658
Work as a critic of the law 658-659
His high principles and conduct as a judge . . . 659-661
Trumbull 661-662
Hedges 662
Newton 662-663
Cooke 663
Civilians cease to be statesmen 663
Effects of the Revolution—validity of James II's commissions to privateers 663-664
Bettesworth 665-666
Lee 666-669
Hedges 669-670
Penrice and Salusbury 671-672
Hay 672-674
Marriott 674-676
The place of the civilian learning in the English legal system . . 677-702
The civilian learning compared with common law and equity . 677
The importance of its contribution 677-678
Settlement of its place in the English legal system . . . 678
Procedure of the ecclesiastical courts and court of Admiralty . 678-681
Comparison with common law and equity procedure . . 681-683
Prize court procedure 683
The later history 683-684
Influence of the civilian procedure 684-685
The civilian contribution to substantive law 685-695
Matrimonial causes 685-686
Testamentary causes 686-689
Ecclesiastical causes 689-692
Maritime causes 692-693
Prize cases 693-694
The distinctive character of these bodies of law . . 694-695
The co-ordination of this law with the common law and equity 695-702
Effects of the separateness of these bodies of law . . 695-697
How co-ordination was effected 697

PAGE

Prohibition and injunction 697-698
Where a prohibition could be got 698-699
Where an injunction could be got 699-700
Partnership between the different courts 700-701
The permanent contribution of the civilians . . . 701-702

VII. BLACKSTONE AND HIS COMMENTARIES . . . 702-737
The historical importance of the Commentaries 702-703
Blackstone's career 703-709
His Commentaries and minor legal works 709-717
The Law Tracts 709-711
Arrangement of the Commentaries 711-712
The later editions during Blackstone's life 712-713
Amendments in them 713
The controversy with Priestley and Furneaux . . . 713-714
Editions after Blackstone's death 714-715
Stephen's Commentaries 715-716
The great reputation of Blackstone's Commentaries . . 716-717
Reasons for the classical quality of the Commentaries . . . 717-727
Blackstone's intellectual qualities 717-720
Circumstances in which the Commentaries were composed . 720-723
Their principal merits 723-726
Their influence on legal development 726
Blackstone's critics 727-736
The charge that he was an indiscriminate apologist for all things established 727-731
The charge that he was a weak political and jurisprudential thinker 731-736
Bentham's *Fragment* and *Comment on the Commentaries* . 731-732
How far his criticisms are valid 732-736
The eighteenth century and its successors 736-737

APPENDIX

I. Viner's Bequest to Oxford University 739-741
(1) Viner's will 739-740
(2) Advertisement of Viner's administrators as to the sale of the *Abridgment* 740-741

II. The Business of the Court of Chancery during the Chancellorships of Hardwicke and Eldon 742

III. Blackstone's Treatment of Equity in his Lectures . . . 743-745

IV. Blackstoniana 745-754
(1) The Advertisement of Blackstone's Pre-Vinerian Lectures 745-746
(2) The Advertisement of Blackstone's Course of Lectures and his Inaugural Lecture as Vinerian Professor . . 746
(3) The Advertisement of Blackstone's Course of Lectures for the year 1759-1760 and the Scheme of the Course . 746-747
(4) The Manuscripts of Blackstone's Lectures . . . 747-750
(5) Gibbon and Blackstone 750-754

V. The Contents of Wyndham Beawes's *Lex Mercatoria Rediviva* . 754-756

INDEX 757-784

LIST OF CASES

[Anonymous Cases are arranged under each reporter's name in order of date]

A

PAGE

A. v. B. 686
Abbott v. Plumbe . . . 506
Abonema, The 674
Abraham v. Bunn . . . 509
Ackroyd v. Smithson . . . 324
Adams v. Broughton . . . 445
Adams v. Crouch . 672, 692, 693
Adams v. Gale 284
Aitchison v. Lohre . . . 567
Albany v. Griffin . . . 453
Alden v. Gregory . . . 300
Alder v. Chip 502
Aleson v. Aleson . . 666, 686
Allan or Allen v. M'Pherson 230, 697
Allen v. Hearne 521
Allport v. Thomas . . . 225
Amies v. Stevens . . . 435
Ancaster v. Mayer . . . 324
Ancher v. Bank of England 477, 489
Anderson v. George . . . 499
Andrew v. Clark . . . 212
Andrews v. Powis . . 695, 700
Anna Christiana, The . . 676
Annesley v. Sherlock . . . 140
Anonymous (1736) 2 Atk. 1 . 289
Anonymous (1738) 1 Atk. 299 . 279
Anonymous (1738) 1 Atk. 491 279, 699, 700
Anonymous (1741) 2 Atk. 173-174 59
Anonymous (1745) 3 Atk. 277 . 271
Anonymous (1712) Cooke 5 . . 453
Anonymous (1721) Cooke 21 . 453
Anonymous (1701) 12 Mod. 564 . 441
Anonymous (1716) 1 P. Wms. 327 219
Anonymous (1750) 2 Ves. Sen. 113 272
Anstis *in re* 268
Anstruther v. Christie . . . 459
Anthon v. Fisher . 477, 535, 701
Appleby v. Appleby . . . 688
Arcot (Nabob of) v. East India Co. 327
Argar v. Holdsworth . . . 691
Armory v. Delamirie . . . 435
Arnold v. Earle 668
Arnot v. Biscoe 61
Ascough v. Chaplin (Lady) . . 453
Ashburner v. Macguire . . 324
Ashby v. White . 129, 195, 201, 455
Aslin v. Parkin 516
Astley v. Reynolds . . . 440
Astley v. Weldon . . . 520
Atcheson v. Everitt . . . 508
Atherfold v. Beard . . 520, 521
Atkin v. Barwick . . . 436
Atkins v. Hill 588
Atkinson v. Leonard . . . 596
Atkinson v. Maling . . . 533
Atterbury's Case . . . 197
Attorney v. Allgood . . . 456
Attorney-General v. Bristol . . 271
Attorney-General v. Brown . . 9
Attorney-General v. Day . 262, 277
Attorney-General v. Duplessis 456, 457
Attorney - General v. Downing (Lady) 309
Attorney-General v. Hooker . 212
Attorney-General v. Johnson . 271
Attorney - General v. London (Mayor of) 327
Attorney-General v. Pearce . . 271
Attorney-General v. Perry . . 457
Attorney-General v. Sparks . . 271
Attorney-General v. Talbot . . 271
Attorney-General for Hong Kong v. Kwok-a-Sing . . . 670
Attorney-General to Prince of Wales v. St. Aubyn . . 10
Augusta, The 693
Awbrey v. Fitzhught . . . 459
Ayliffe v. Murray . . . 272

B

Bacon v. Searles . . . 576
Bagshaw v. Spencer . . . 272
Baile (or Bale) v. Coleman 199, 201, 203, 228
Bailey v. Ekins 280
Baily v. Baily 686
Bainton v. Ward . . . 279
Baker v. Malin 692
Baker v. Paine 281
Ball v. Herbert 581
Bambridge, Case of . . . 439
Banbury v. Lisset . . 445, 446
Bankers' Case 129

	PAGE
Banks v. Sutton	221
Banque Belge v. Hambrouck	547
Barbuit's Case	218, 467, 510
Barefoot v. Fry	458
Barjean v. Walmsley	444
Barker v. Lamplugh	450
Barnardiston v. Lingood	275
Barnardiston v. Soame	596
Barnesly v. Powell (or Powel)	61, 291, 696, 697
Barton v. Ashton	668, 691
Barwell v. Brooks	553
Basset v. Basset	295
Bateman v. Roach	232
Bates v. Dandep	270
Bath (Earl of) v. Sherwin	198, 209, 234, 458
Bauerman v. Radenius	597, 600
Baxter v. Buckley	668
Baylis v. London (Bishop of)	544
Bayntun v. Walton	153
Beaumont (Duke of) v. Berty	209
Bechuanaland Exploration Co. v. London Trading Bank	528
Beckham v. Chapman	670, 692
Beckwith v. Shordike	524
Belchier *ex parte*	273
Bell v. Gilson	540
Bellamy v. Burrow	110
Bellasis v. Uthwatt	269
Bennet v. Bennet	212
Bennet v. Buggin	672, 692
Bennet v. Davis	231
Bennet v. Wade	230
Bennett v. Allcott	523
Bennett v. Hale	74
Bennett v. Reeve	449
Benson v. Benson	218
Bent v. Baker	509
Berkley Freeman v. Bishop	274
Berney v. Pitt	235
Bettesworth v. St. Paul's Dean and Chapter	47, 665
Bexwell v. Christie	518
Bickerdike v. Bollman	531
Bigg v. Keen	688
Birch v. Blagrave	194, 549
Birch v. Wright	490
Bird v. Bird	668, 686
Bird v. Line	451
Bird v. Randall	502, 519
Bittleston v. Clark	688
Blackwell v. Blackwell	697
Blackwell v. Harper	283
Blake v. Lanyon	582
Blanchard v. Hill	283
Blanchet v. Foster	275
Blandy v. Widmore	200
Blatch v. Wilder	280, 284
Blesard v. Hirst	531
Blik v. Halfpenn	453
Blinkhorn v. Feast	272
Blissett v. Hart	449
Blount (Sir Henry) Case of	284, 606, 614, 701
Boddicott v. Dalzeel	667
Bokenham v. Bentfield	458
Bole v. Horton	148
Bologne v. Vautrin	60
Bolton v. Prentice	444
Bomley v. Frazier	436
Bond v. Faikney	687
Bond v. Nutt	537
Bonfield v. Milner	502
Bonham's Case	151
Booreman's Case	29
Bosanquet v. Dashwood	216, 548
Boteler v. Marmaduke	281
Boucher v. Lawson	432
Boughton v. Boughton	270
Bourne v. Keane	160
Bowyer v. Bampton	444
Boyce v. Whitaker	503
Braddyll v. Jehen	667
Brady v. Cubit or Cubitt	219, 515
Brandon v. Nesbitt	535, 581
Brandon v. Robinson	325, 326
Brass Crosby's Case	136, 568
Brettell v. Wilmot	690
Bright v. Eynon	467, 497
Brinsmead v. Harrison	445
Bristow v. Wright	499, 500
British Mutual Banking Co. v. Charnwood Ry. Co.	505
British South Africa Co. v. De Beers Consolidated Mines	265
Broderick v. Broderick	203
Bromfield v. Wytherley	229
Bromley v. Holland	596
Brooke v. Gally	274
Brooks v. Rogers	576
Brotherton v. Hellier	697
Brounsall *ex parte*	59
Brown v. Atkins	689
Brown v. Borlace	37
Brown v. Chapman	523
Brown v. Elton	212
Brown v. Harraden	582
Brown v. Kenyon	672, 693
Brown v. Litton	202, 203
Browning v. Morris	548
Bruse v. Attorney-General	457
Buck v. Draper	697
Buckinghamshire (Earl) v. Drury	301, 518
Bucknal v. Roiston	200
Burdet v. Hopegood	209
Burgess v. Wheate	134, 246, 291, 301, 303, 323, 467, 555, 557, 558, 585, 587
Burridge v. Bradyl	200
Burton *ex parte*	263
Burton v. Fitzgerald	444
Burton v. Thompson	497
Bury St. Edmunds (Aldermen) v. Evans	458

	PAGE
Bush *ex parte*	60
Bush v. Steinman	567
Bushel v. Miller	435, 458
Butler v. Butler	686
Butler v. Dolben	668, 669
Butler v. Gastrell	459
Butler v. Pendergrass	235
Button v. Downham	521
Buxton v. Lister	263, 290

C

Cadell v. Palmer	300, 374
Cadogan v. Kennett	516
Caldwell v. Ball	487, 491, 533
Calvin's Case	129
Campbell v. Hall	318, 511
Camplin v. Bullman	457, 461
Cannel v. Buckle	209
Cappur v. Harris	459
Car v. Burlington (Countess)	203
Cardale v. Harvey	688
Carne v. Long	271
Carpenter v. Shelford	688
Carte v. Carte	259, 260
Carter v. Boehm	507, 536
Carter v. Murcot	483
Cary v. Abbot	271
Casborne (or Casburne) v. Scarfe	221, 261, 278, 295
Castell v. Bambridge and Corbett	439
Cator v. Pembroke (Earl)	327
Cattell *in re*	152
Caus *in re*	152
Chambers v. Caulfield	579
Chambers v. Robinson	440
Chapman v. Blissett	217
Charitable Corporation v. Sutton	273
Charles Havernersworth, The	683
Chatwode v. Crew	449
Chesman v. Nainby	440
Chesterfield (Earl) v. Bolton (Duke)	458
Chesterfield v. Janssen or Jansen	262, 263, 290, 445, 468
Chichester v. Lethbridge	449
Chillingworth v. Esche	154
Cholmondeley v. Clinton	185, 372
Churchill v. Hobson	203
Cibber v. Sloper	523
City of London v. Nash	277
Clare v. Clare	231
Clarendon (Earl) v. Hornby	209
Clark v. Sewell	269
Clark v. Swift	453
Clarke v. Parker	143
Clarke v. Royal Duke	692
Clarke v. Shee	543, 548, 589
Clarkson v. Woodhouse	517
Clement's Inn Case	41
Clerk v. Wright	277
Clerke v. Comer	432
Clifton v. Lombe	272
Coggs v. Barnard	394
Coghlan v. Williamson	506
Cole *ex parte*	60
Cole v. Rawlinson	507
Colebrook v. Dobbs	498
Coleham v. Cooke	455
Collins v. Butler	445
Collins v. Emett	504
Collins v. Lewis	152
Collis v. Ernett	575
Colt v. Netherville	221
Columbus, The	676
Combe v. Pitt	132, 514
Companhia dè Moçambique v. British South Africa Co.	265
Compton *in re*	194
Compton v. Collinson	575
Concordia Affinitatis, The	676, 683
Constantia, The	693
Constanza, The	672
Cook v. Fountain	227
Cook v. Gregson	280
Cook v. Jones	566
Cook v. Oakley	219
Cooke v. Oxley	582
Cookson v. Somerset (Duke)	218
Coope v. Eyre	575
Cooper v. Chitty	521, 541
Cooper v. Elston	436
Coore (Doe d.) v. Clare	589
Copley v. Copley	203
Coppin v. Coppin	212
Corbett v. Poelnitz	553, 589
Cork v. Baker	450
Cornu v. Blackburne	535
Cornwal v. Wilson	282
Cornwallis's Case	194
Cotton v. King	231
Coulson v. White	263
Coventry v. Coventry	263
Cowper v. Cowper	227, 587
Cowper v. Verney	449
Cox v. Bateman	273
Cox v. Hickman	567
Cox v. Liotard	541
Cox v. Ricraft	699
Craddock Brothers v. Hunt	277
Craw v. Ramsey	152
Cremer v. Dakins	665
Croft v. Pyke	212
Crosby, Brass Case	136, 568
Crossling v. Scudamore	449
Cud v. Rutter	208, 221
Cuddingham v. Webb	30
Cumber v. Wane	435
Cutler v. Wright	692
Cutter v. Powell	520, 582

D

Da Costa v. De Pas	271
Da Costa v. Jones	521
Dale v. Hall	445

PAGE

Dalrymple v. Dalrymple . . 583
Dancer v. Crabb . . . 200
Darley v. Darley. . 275, 276, 309
Darwin v. Upton . . . 506
Davenport v. Oldis . . . 261
Davidson v. Foley . . . 327
Davis v. Bowsher . . . 581
Davis v. Davis 181
Davis v. Dinwoody . . . 450
Davis v. Pierce 507
Davis v. Rotch . . . 672, 692
Davis v. Saunders . . . 524
Dawkins v. Paulet (Lord) . . 567
Day v. Wolfe . . . 672, 692
De Costa v. Scandret . . . 210
De Hahn v. Hartley . . . 536
De Mestre v. West . . . 267
Deeks v. Strutt 588
Denn d. Gaskin v. Gaskin . . 232
Dering v. Winchelsea (Earl) . 566
Devenish v. Baines . . . 235
Devon v. Watts 134
De Yong Joslers . . . 693
Dickens *in re* . . . 484, 559
Dickenson (or Dickinson), The 674, 675, 694
Die Vier Gebroeders . . . 693
Dixon v. Harrison . . . 151
Dixon v. Ward 682
Doddington v. Hallet . . 282, 284
Doe d. Coore v. Clare . . 589
Doe v. Fonnereau . . 134, 577
Doe v. Laming 507
Doe v. Lancashire . . . 581
Doe v. Martin 581
Doe v. Routledge . . . 516
Donaldson v. Becket (or Beckett) . 309, 313, 318, 483, 484, 559
Done's Case 203
Dormer v. Fortescue . . . 290
Dormer v. Parkhurst . . . 449
Dormer (Mr. Justice) Case . . 209
Dorset (Duke of) The . . . 671
Doulson v. Mathews . . . 582
Dovaston v. Payne . . . 567
Dowden v. Pook 440
Drakeford v. Wilks . . . 272
Draper's Case 231
Drinkwater v. Royal Exchange Assurance Co. . . 481, 540
Drummond v. Drummond . . 152
Drummond v. Hamilton . . 688
Drury v. Drury 301
Drury v. Hook 548
Dubber v. Trollop . . . 432
Duberly v. Gunning . . 579, 580
Duke of Dorset, The . . . 671
Dundass v. Weymouth (Lord) . 503
Dunlop v. Proceeds of Neptune . 672
Dursley v. Fitzhardinge Berkeley 569
Dverges v. Sandeman Clark & Co. 203
Dyer v. Dyer 566

E

PAGE

Earle v. Hinton . . . 452
East India Co. v. Naish . . 461
East India Co. v. Sandys . . 129
Eaton v. Jaques . . . 588
Eaton v. Southby . . . 449
Edelstein v. Schuler . . . 528
Edie v. East India Co. 478, 479, 481, 527, 530
Ekins v. Macklish . . . 282
Ellerman Lines v. Read . . 264
Elliott v. Lister . . . 672, 700
Ellis v. Smith . . . 149, 156
Elsam *in re* 59
Elsee v. Gatward . . . 582
Elton v. Brogden . . . 445
Elwes v. Maw 581
Erving v. Peters . . . 580
Etriche v. Revenue Officer . . 458
Evans v. Astley 507
Evans v. Bicknell . . . 597
Evelyn v. Chichester . . . 518
Evelyn v. Evelyn . . . 142
Exall v. Partridge . . . 583
Eyre v. Eyre 219
Eyston v. Studd 592

F

Fairclaim v. Shamtitle . . 481
Fairless v. Thorsen . . 673, 697
Fairtitle v. Gilbert . . . 504
Falkland (Viscount) v. Phipps . 459
Farewell v. Chaffey . . . 497
Farmer v. Arundel . . 569, 707
Farmer v. Darling . . . 523
Farmer v. Davies . . . 534
Farnham v. Phillips . . . 269
Farquharson v. Floyer . . 152
Farr v. Newman . 485, 490, 580
Farrington v. Knightly . . 209
Fawcet v. Lowther . . . 301
Felicite, La 693
Fell v. Dorothy, The . . . 672
Fenner v. Mears . . . 569
Fenwick's Case 197
Ferguson v. Cuthbert . . . 459
Field v. Walford . . . 453
Finch (Lady Hatton) Goods of . 77
Fisher v. Fisher . . . 142
Fisher v. Prince . . . 152
Fitz-Gerald v. Pole . . . 385
Fitzroy v. Gwillim . . . 548
Fleet v. Holmes . . . 700
Fletcher v. Ashburner . . 324
Fletcher v. Dyche . . 488, 519
Floyd v. Waugh . . . 61
Floyde's (Sir Robert) Case . . 10
Foakes v. Beer 435
Folkes v. Chadd . . . 507
Folliott v. Ogden . . . 576

	PAGE
Foote v. Richards	668, 691
Forth v. Chapman	209
Forward v. Pittard	516
Foster v. Blagden	314
Foster v. Vassall	263, 264
Foster v. Wilmer	445
Fox v. Hanbury	531, 541
Fox v. Mackreth	324
Foxwell v. Van Grutten	323
Francis v. Rucker	309
Frazer's Case	58
Freeman (Berkley) v. Bishop	274
Freeman v. Jeffries	544
French v. Davies	299
Full v. Hutchins	698
Furtado v. Rogers	540

G

Gage v. Bulkeley	284
Galton v. Hancock	261, 280, 290
Gandy v. Gandy	273
Gardiner v. Croasdale	502, 525
Gardner *ex parte*	276
Garth v. Cotton	272
Gaskin (Denn d.) v. Gaskin	232
Gates v. Carlisle	503
Gee v. Audley	328
Gee v. Smart	598
George v. Clagett	582
Gerard's Case	707
Gibson v. Hunter	492, 567
Gibson v. Paterson	277
Ginger v. White	454
Girardot Buissieres v. Albert	688
Gist v. Mason	539, 540
Glenorchy v. Bosville	217
Glissen v. Ogden	212
Glover v. Black	526, 537
Glynn v. Bank of England	291
Goddard v. O'Brien	435
Goddart v. Garratt	539
Godfrey v. Watson	278
Godwin v. London Assurance Co.	537
Goodall v. Doolley	531
Goodall v. Goodall	686
Goodeson v. Gallatin	314
Goodinge v. Goodinge	507
Goodright v. Moss	506, 507
Goodright v. Pullyn	441
Goodtitle v. Chandos (Duke)	132, 505
Goodtitle d. Jones v. Jones	597
Goodtitle v. Otway	257, 580
Goodtitle v. Paul	496
Goodwin v. Crowl	520
Goodwin v. Robarts	528
Gordon v. Harper	582
Gordon v. Morley	445
Goring v. Nash	262, 268, 291
Gorton v. Hancock	156
Goss v. Withers	467, 537, 538
Gott v. Atkinson	454
Gower v. Mainwaring	272
Grace v. Smith	568
Graham v. Londonderry	275
Grammar v. Nixon	451
Grant v. Gordon	459
Grant v. Gould	575
Grant v. Vaughan	529
Granville (Lady) v. Beaufort (Duchess)	199
Graves v. Budgel (Eustace)	281
Graydon v. Hicks	279
Green v. Brown	445
Green v. Duckett	440
Green v. Farmer	451
Green v. Rutherford	271
Greenway *ex parte*	252
Grey v. Kentish	270
Griffith v. Spratley	229
Grigby v. Cox	276
Grove v. Dubois	532, 541
Gyles v. Wilcox	283

H

Hadley v. Clarke	582
Halfhide v. Fenning	328
Hall v. Harding	467
Hambly v. Trott	521
Hamilton v. Davis	467, 534
Hamilton (Duke) v. Douglas	309
Hamilton v. Mendes	525, 537, 538
Hanbury v. Hanbury	327
Hankey v. Jones	496
Hardie v. Chilton	156
Harding v. Glyn	245
Hardy v. Bern	520
Hargrave v. Le Breton	522
Harper v. Gravenor	692
Harrison v. Evans	309
Harrison v. Rhodes	689
Harrison v. Southcote	281
Harry v. Littleton	668, 690
Hart v. Weston	498
Hartley v. Buggin	497
Harvey v. Ashley	291
Harvey v. Aston	256, 259, 274, 701
Harvey v. Harvey	199, 231, 700
Harwood v. Goodright	516
Hassell v. Tynte	280
Hastelow v. Jackson	549
Hatch v. Hatch	61
Hatchett v. Baddeley	707
Hatton v. Hatton	442
Hatton Finch (Lady) In the Goods of	77
Hawkes v. Saunders	489, 588
Haycraft v. Creasy	581
Hayes v. Warren	440
Hayward v. Dale	687
Hayward v. Whitby	153
Head v. Winton	459
Heard v. Stanford	217, 227
Hearle v. Greenbank	269, 276

PAGE

Heathcote v. Paignon . . . 229
Heilbert Symons & Co. v. Buckleton 157
Helyar v. Helyar . . 667, 687
Henderson v. Beatty . . . 682
Hendric & Alida, The 673, 675, 693
Henkle v. Royal Exchange Assurance Co. 281
Hermann v. Charlesworth . . 548
Herne v. Meeres . . . 229
Herne v. Meyrick . . . 203
Hervey v. Aston . . . 221
Hervey v. Hervey (1739) 1 Atk. 563 268
Hervey v. Hervey (1773) 2 W. Bl. 877 700
Hewet v. Ireland . . . 209
Heylyn v. Adamson . . . 530
Highwayman's Case . . 59, 67
Hill *ex parte* 299
Hill v. London (Bishop of) . . 272
Hill v. Metropolitan Asylum District 451
Hill v. Spencer 309
Hill v. Turner 273
Hillyard v. Taylor . . . 314
Hillyer v. Milligan . . 669, 691
Hinton v. Donaldson . . . 484
Hoare v. Dawes 531
Hodgson v. Ambrose . . 153, 483
Hogan v. Jackson . . . 516
Holford v. Hatch . . . 517
Holiday v. Pitt 432
Holland v. Royal Charlotte, Proceeds of 672
Holman v. Johnson . . . 467
Holmes v. Holmes . . . 668
Holt v. Clarencieux . . . 440
Holt v. Frederick . . . 212
Holt v. Markham . . . 547
Home v. Camden (Earl) . . 575
Hoop, The 540
Hopkins v. Hopkins 217, 265, 266, 268, 272
Hopper v. Davis . . . 691
Hopton v. Dryden . . . 194
Horwood v. Smith . . . 581
Hotham v. East India Co. . 528, 533
Howard v. Castle . . . 518
Howard v. Digby . . . 209
Howe v. Nappier . . 699, 700
Hudson v. Hudson . . 225, 279
Hughes v. Cook . . . 688
Huguenin v. Basely . . . 300
Huett v. Dash 691
Hull (Mayor of) v. Horner . 505, 517
Hulle v. Heightman . . . 520
Hulme v. Tennant . . . 325
Humberston v. Humberston . 199
Hunter *ex parte* . . . 283
Hunter v. Maccray . . . 203
Huntingdon (Earl) v. Huntingdon (Countess) 194
Hyde v. Seymour . . . 230
Hylton v. Hylton . . . 275

I

PAGE

Ilatt v. Lisset 453
Israel v. Douglas . . . 576
Israel v. Etheridge . . . 458
Ivy's (Lady) Case . . . 129

J

Jackson v. Gisling . . . 132
Jackson v. Hobhouse . . . 325
Jackson v. Vernon . . . 576
James v. Greaves . . . 237
James v. Warren . . . 444
Jefferies v. Austin . . . 454
Jekyll v. Jekyll 667
Jenkins v. Tucker . . . 576
Jenner v. Harper . . . 203
Jenney v. Herle 436
Jennings v. Rundall . . . 582
Jenys v. Fawler 441
Jestons v. Brooke . . . 543
Jesus College v. Bloom . . 263
Jevon v. Bush 596
Johnson v. Houlditch . . . 499
Johnston Foreign Patents Co. *in re* 449
Jones v. Harris . . . 325, 326
Jones (Goodtitle d.) v. Jones . 597
Jones v. Lewis 273
Jones v. Maunsel . . . 475
Jones v. Meredith . . . 459
Jones v. Randall . 152, 153, 521
Jones v. Roe 581
Jones v. Scott 203
Jones v. Smart . . . 477, 486
Jones v. Yarnold . . . 666
Joynes v. Statham . . . 277
Jungfre Maria, The . . . 676

K

Keddington v. Bridgman . . 458
Keech v. Sandford . 211, 230, 324
Keeling v. M'Egan . . . 687
Keller v. Bevoir 665
Kelly v. Solari 544
Kempe v. Antill 326
Keylway v. Keylway . . . 212
Kim, The 655
King *ex parte* 279
Kingston v. Preston . . . 520
Kingston's (Duchess of) Case 575, 673, 681, 700
Kinlyside v. Thornton . . 707
Kirby v. Clayton . . . 272
Kirkham v. Smith . . . 224
Knight v. Cambridge . . . 454
Knight v. Plymouth (Lord) . . 273
Knipe v. Jesson 230
Kruger v. Wilcox . . . 282

L

PAGE
La Prosperite, The . . . 676
Lacon v. Mertins . . 277, 284
Lake v. Hayes . . . 283, 289
Lake v. Lake 281
Lamego v. Gould . . . 521
Lamkin v. Babb . . 667, 687
Lampley v. Thomas . . . 444
Lamplugh v. Lamplugh . . 200
Lancashire Loans Co. v. Black . 262
Land v. North (Lord) and the Bank of England . . . 102, 512
Lane v. Cotton 511
Lane v. Page 275
Langdale v. Mason . . . 540
Laud v. Browne . . . 688
Lavabre v. Wilson . . . 537
Lavie v. Phillips . . . 541
Law v. Davis 441
Lawes v. Bennett . . . 328
Lawley v. Hooper . . . 275
Le Caux v. Eden . 486, 491, 626
Le Neve v. Le Neve . . 213, 267
Le Pypre v. Farr . . . 539
Le Vie v. Philips . . . 143
Leame v. Bray 485
Lean v. Schutz . . . 589, 707
Leaver v. Whicker . . . 453
Lechmere v. Carlisle (Earl) . 218, 221
Lechmere v. Lechmere . . 218
Lechmere & Lloyd *in re* . . 152
Lee v. Cox . . . 261, 269
Lee v. Gansel 475
Lee v. Lee 229
Legg v. Goldwire . . . 217
Leigh's (Mr.) Case . . . 77
Leighton v. Leighton . . . 210
Leman v. Alie 232
Lempriere v. Pasley . . 283, 487
Leslie v. Sheill 236
Lethieullier v. Tracy . . . 290
Lewis v. Lechmere (Lord) . 232
Lewis v. Bulkeley . . . 687
Lewis v. Rucker . 526, 538, 539
L'Huille v. Wood . . . 667
Lickbarrow v. Mason 282, 283, 476, 485, 487, 489, 491, 497, 524, 527, 541, 548, 575, 723
Lilly v. Ewer 508
Lilly v. Hardy . . . 668, 690
Limpus v. London General Omnibus Co. 580
Lindo v. Rodney 491, 536, 626, 683
Line v. Harris 668
Lingen v. Sowray . . . 203
Lloyd v. Beatniffe . . . 696
Lloyd v. Beeston . . . 453
Lloyd v. Grace Smith & Co. . 451
Lloyd v. Johns 185
Lloyd v. Owen . . . 668, 691
Lloyd v. Smith (Grace) & Co. . 451
Lockwood v. Ewer . . . 290
Lockyer v. Offley . . 486, 533
London Assurance Co. v. Sainsbury 477
London (Bishop of) v. Ffytche 152, 153, 398, 559
London (City of) v. Nash . . 277
London (Corporation of) v. Evans 714
London & River Plate Bank v. Bank of Liverpool . . . 531
Long v. Allen 528
Long v. Dennis . . . 518
Loveacres v. Blight . . . 515
Low or Lowe v. Peers 481, 518, 519
Lowe v. Waller 444
Lowry v. Bourdieu 477, 486, 539, 546, 548
Lowther v. Carlton . . . 267
Loyd v. Lee 435
Luke v. Lyde 467, 496, 497, 525, 533
Lumley *in re* 326
Lumley v. Palmer . . . 432
Lutwich v. Lutwich . . . 228
Lynall v. Longbothom . . 132
Lynch v. Dalzell . . . 541
Lytton v. Lytton . . . 299

M

Macbeath v. Haldimand . 487, 511
Macdowall v. Fraser . . . 536
Mackdonnel v. Gunter . . 453
Mackensie v. Ogilvie . 672, 673, 692
McManus v. Cooke . . . 231
McManus v. Crickett . . 580
Macrow v. Hull 497
Maddon v. White . . 490, 518
Man v. Ward 281
Manby v. Scott 399
Manners v. Banning . . . 235
Manning v. Lechmere . . 281
Mansell v. Mansell . . . 212
March (Earl) v. Pigot . . 521
Maria Francoise, The . . . 674
Marlborough (Duke) v. Godolphin (Lord) 295, 300
Marlow v. Pitfield . . . 235
Marriot v. Hampton . . 546, 583
Marriott v. Thompson . . 452
Marsh v. Lee 266
Marshall v. Rutton 553, 582, 589, 597
Marston v. Roe 219
Martin v. Robinson . . 681, 682
Martyn v. Hind 467
Mascoll v. Scaife . . . 681
Massey v. Rice 498
Massey v. Sherman . . . 272
Mast v. Goodson . . . 707
Master v. Miller . 567, 582, 589
Master v. Stone 687
Mathews v. Lewis . . . 566
Maxwell v. Wettenhall . . 209

PAGE

Mead v. Orrery (Lord) . . 291
Meake or Meeke v. Holland (Lord) 673, 692, 698, 700
Medcalfe v. Medcalfe . . . 270
Mercer v. Morland . . . 688
Merryweather v. Nixan . . 582
Methwold v. Walbank . . 263
Micklefield v. Hepgin . . . 566
Middleton v. Crofts 242, 256, 432, 700
Middleton v. Spicer . . 303, 323
Milburn v. Salkeld . . . 449
Millar v. Taylor 102, 208, 467, 477, 483, 484, 485, 486, 559
Miller v. Atlee 544
Miller v. Race 529
Miller v. Shepherd . . . 687
Millington v. Sorsby . . . 700
Mills v. Farmer 142
Milner v. Colmer . . . 212
Milner v. Duncan . . . 546
Milner v. Harewood (Lord) . . 301
Minnett v. Robinson . . . 450
Mirehouse v. Rennell . . . 152
Mitchel or Mitchell v. Reynolds 207, 208
Mocambique, Companhia de v. British South Africa Co. . 265
Moeser v. Wisker . . . 154
Moffat v. Farquharson . . 328
Moggridge v. Thackwell . . 271
Money v. Leach . . . 510
Moneypenny v. Dering . . 199
Montacute v. Maxwell . . 208
Montefiori v. Montefiori . . 504
Montgomery v. Clark 261, 291, 696
Moore v. Moore . . . 276
Moore v. Stevens . . . 687
Moravia v. Sloper . . . 451
More v. Manning . . . 454
More v. More 273
Morecock v. Dickens . . . 309
Morgan v. Hughes . . . 522
Morret v. Paske . . . 278
Morrice v. Bank of England . 218
Morris v. Burroughs . . . 267
Morris v. Darling . . . 699
Morris v. Lee 441
Morris v. Martin . . . 440
Morris v. Miller 523
Morris v. Pugh & Harwood . 501
Mortimer *in re* 200
Morton v. Lamb . . . 582
Moses v. Macferlan 501, 542, 543, 544, 545, 546, 589
Mostyn v. Fabrigas . . . 512
Musprat v. Gordon . . . 566

N

Nabob of Arcot v. East India Co. . 327
Neate v. Denman . . . 30
Needham v. Smith . . . 194
Nelson v. Powell . . . 532

PAGE

New *in re* 230
Newby v. Reed 537
Newcoman v. Bethlem Hospital . 261
Newman v. Croft . . . 692
Newstead v. Johnston . . . 279
Newstead v. Searles . . . 267
Newton v. Bennet . . 229, 280
Nicholson v. Chapman . . 567
Nickson v. Brohan . . . 208
Noble v. Kennoway . . . 537
Nocton v. Ashburton (Lord) . 236
Norfolk (Duke of) Case . . 228
Norris v. Le Neve . . . 291
Norton v. Frecker . . . 689
Norton v. Relly . . . 300
Norway v. Rowe . . . 142
Nostra Senora De La Luz . . 672
Nott v. Johnson 235
Nottingham (Mayor) v. Lambert . 449
Nourse v. Yarworth . . . 230
Nugent v. Smith . . . 519
Nutt v. Bourdieu . . . 533

O

O'Grady v. Wilmot . . . 457
Oldham v. Hughes . . 266, 326
Olive v. Ingram . . . 443
Olive v. Smith 143
Omychund (or Omichund) v. Barker 156, 256, 281, 454, 508, 510, 551, 554, 701
O'Neil v. Marson . . . 153
Onions v. Tyrer 200
Openheimer v. Levy . . . 444
Osborn v. Guy's Hospital Governors 440
Osborne to Rowlett . . . 156
Owen's Case 305

P

Padget v. Priest . . . 490
Paget v. Gee . . . 259, 260
Palmer v. Mason . . . 280
Palmer v. Mure 314
Paradine v. Jane . . 458, 519
Parfit v. Lawless . . . 237
Parke v. Davis 452
Parker v. Clive 511
Parkes v. White 325
Parkhurst v. Smith . . . 108
Partington v. Barnes (Rector of) . 691
Pasley v. Freeman . 485, 580, 597
Patten v. Castleman 668, 690, 698, 699
Pawlet v. Head . . . 691
Pawson v. Watson . . . 536
Payne v. Rogers . . . 499
Peachy v. Somerset (Duke of) 210, 323
Peacock v. Monk . . . 276
Peacock v. Rhodes . . . 530

PAGE

Peake v. Oldham . . . 522
Pearne v. Lisle 282
Pearson v. M'Gamon . . 696
Pelham (Lord) v. Pickersgill . 488
Pelly v. Royal Exchange Assurance Co. . . 525, 528, 537
Pendrell v. Pendrell . . . 441
Penn v. Baltimore (Lord) . 264, 265
Penton v. Robart . . . 581
Peploe v. Swinburn . . . 458
Père Adam, The . . . 676
Perrin v. Blake 102, 323, 374, 477, 483, 484, 486, 515, 553, 558, 559, 565, 569, 707
Perry v. Whitehead . . . 219
Philipson v. Harvey . . . 689
Phillips v. Foxall . . . 212
Phillips v. Hedges . . . 453
Phillips v. Hunter . . 546, 567
Phipps v. Steward . . . 279
Pickering & Towers v. Towers 668, 687
Piddle v. Toller . . 76, 77
Pierson v. Dunlop . . . 531
Pierson v. Garnet . . . 327
Pillans v. Van Mierop 481, 483, 556, 559
Piracy, *jure gentium in re* . . 670
Pistol v. Riccardson . . . 153
Pleydell v. Pleydell . . . 209
Plumptre's Settlement *in re* . 268
Plunket v. Penson . . . 280
Pohlman v. Untzellman . . 699
Pole v. Horrobin . . . 507
Pole v. Pole 272
Pope v. Curl 283
Postilion, The 676
Postlethwaite v. Parkes . . 523
Potts v. Bell . . . 540, 581
Powell v. Hankey & Cox . . 209
Powell v. Monnier . . . 283
Powell v. Price 232
Pratt v. Pratt 228
Prentice v. Prentice . . . 77
Prescot *ex parte* . . . 260
Price v. Fletcher . . . 503
Price v. Helyar 134
Price v. Neal 531
Priest v. Parrot . . . 263
Prince's Case 10
Prince of Wales v. Liverpool (Earl) 596, 597
Princess of Wales v. Liverpool (Earl) 252
Pringle v. Brown . . . 688
Proof v. Hines 217
Prowse v. Abingdon . . 232, 261
Pugh v. Leeds (Duke of) . . 153
Pullen v. Middleton (Lord) . . 265
Pusey v. Pusey 218
Pybus v. Smith . . . 325, 326
Pye v. Gorge 202
Pytt v. Fendall & Jones . 681, 687

Q

PAGE

Quantock v. England . . . 142

R

Radcliff v. Venfield . . . 696
Rakestraw v. Brewer . . . 30
Ramsey v. Calcot . . . 687
Randall v. Collins . . . 691
Rann v. Hughes . . . 565
Ratcliffe v. Graves . . . 229
Raynard v. Chase . . . 498
Read v. Brookman . . 485, 580
Rebecca, The 676
Rebeckah, The 11
Rebow v. Bickerton . . . 459
Reech v. Kennegal . . . 272
Rees v. Harris 690
Reg. v. Cuming 511
Reg. v. Edwards . . . 138
Reg. v. Jackson 437
Reg. v. Labouchere . . . 582
Reg. v. Millis 716
Reg. v. Read 439
Reg. v. Tutchin 204
Rennen v. Humble . . . 670
Repington v. Holland . . . 688
Reward, The 676
Rex v. Abingdon (Lord) . . 581
Rex v. Allen 41
Rex v. Almon . . . 135, 481
Rex v. Atkins 514
Rex v. Aylett 514
Rex v. Bagworth Inhabitants . 504
Rex v. Barnard's Inn . . . 31
Rex v. Bembridge . . 156, 513
Rex v. Bennett 437
Rex v. Blake 514
Rex v. Brasier 441
Rex v. Bray 509
Rex v. Broadfoot . . . 136
Rex v. Bryan 440
Rex v. Cambridge University, Chancellor, Masters, etc. . 433
Rex v. Canterbury (Archbishop of) 47
Rex v. Clark (1726), 1 Comyns, 388 456
Rex v. Clark (1777), Cowp. 612 . 156
Rex v. Cliviger 508
Rex v. Cornwall . . . 439
Rex v. Cowle . . . 467, 512
Rex v. Cranburne . . . 433
Rex v. Crooke 439
Rex v. Curl 439
Rex v. Dawson 670
Rex v. Day 447
Rex v. Delaval 514
Rex v. Denyer 156
Rex v. Despard 580
Rex v. Enderupp . . . 456
Rex v. Fielding . . . 514

PAGE

Rex v. Fitzgerald . . . 444
Rex v. Francis 437
Rex v. Francklin . . . 439
Rex v. Gray's Inn Benchers . 29
Rex v. Green 514
Rex v. Hare and Mann . . 257
Rex v. Hathaway . . . 437
Rex v. Hensey 506
Rex v. Higgins 580
Rex v. Hood 447
Rex v. Horne Tooke . . . 317
Rex v. Huggins 438
Rex v. Kennett 514
Rex v. Kinlock 443
Rex v. Kinnersley and Moore . 436
Rex v. Lincoln's Inn Benchers 29, 30, 31, 32, 33
Rex v. Lister 436
Rex v. Liverpool (Mayor) . . 476
Rex v. Lyme Regis (Mayor of) . 498
Rex v. MacGrowther . . . 443
Rex v. Miller 317
Rex v. Muilman and Macky . 457
Rex v. Oliver 456
Rex v. Oneby 438
Rex v. Owen 443
Rex v. Paine 513
Rex v. Peters . . . 476, 479
Rex v. Philips . . . 494, 500
Rex v. Pinney 515
Rex v. Plympton . . . 437
Rex v. Ponsonby . . . 447
Rex v. Poole 432
Rex v. Read 439
Rex v. Reason and Tranter. . 132
Rex v. Rhodes 442
Rex v. Rudd 514
Rex v. Sandbach . . . 717
Rex v. Sedley 439
Rex v. Shipley (Dean of St. Asaph), 477, 486, 513, 564
Rex v. Simpson . . . 697, 700
Rex v. Storr 514
Rex v. Stubbs 488
Rex v. Topham 582
Rex v. Townley 443
Rex v. Travers 441
Rex v. Tubbs 510
Rex v. Vaughan . . . 511, 513
Rex v. Waddington . . . 580
Rex v. Ward . . . 77, 439
Rex v. Watson 514
Rex v. Westbeer 443
Rex v. Wheatly 514
Rex v. Wilkes . 9, 475, 502, 716
Rex v. Woodfall . . . 317
Rex v. Woolston . . . 439
Rex v. Wright 580
Reynish v. Martin . . . 280
Reynold v. Clarke . . . 440
Reynolds v. Caswell . . . 56
Rice v. Shute 532

PAGE

Richardson *in re* . . . 200
Richardson v. Sutton . . . 455
Ricord v. Bettenham . . . 531
Ridout v. Plymouth (Earl) . . 263
Ringsted v. Lanesborough (Lady) 553
Rippon v. Dawding . . . 309
Roberdeau v. Rous . . . 264
Roberts v. Roberts . . . 548
Robertson *ex parte* . . . 128
Robinson v. Bland 153, 467, 479, 518
Robinson v. Byron (Lord) . . 326
Robinson v. Green . . . 436
Robinson v. Litton . . . 259
Robinson v. Raley . . 479, 499
Robinson v. Winchelsea (Earl) . 315
Roe v. Griffits . . . 515, 555
Roe v. Harvey . . . 477, 516
Roe v. Wickett 454
Rogers v. Ingham . . . 546
Roles v. Rosewell . . . 520
Rollfe v. Budder . . . 458
Rondena v. Wyatt . . . 575
Ross v. Bradshaw . . . 540
Ross v. Johnson 521
Rowe v. Hasland . . . 506
Rowland v. Jones . . . 691
Rowland v. Veale . . . 502
Roy v. Beaufort (Duke) . . 263
Rudder v. Price 575
Rumsey v. Tizard . . . 689
Ruscombe v. Hare . . . 294
Russel v. Hammond . . 259, 289
Russel v. Longstaffe . . . 504
Rust v. Cooper 152
Rust v. Roe . . . 478, 481
Ryall v. Rowles, sub. nom. Ryall v. Rolle . . 259, 282, 290, 445

S

Sadlers Co. v. Badock 283, 539, 541
St. Albans (Duke of) v. Beauclerk 701
St. Amand v. Jersey (Countess) . 458
St. Asaph's Case, *see* Rex v. Shipley.
St. Juan de Luz v. Pococke . 672
St. Thomas's Hospital (Governors) v. Trehorne . . . 668, 691
Sally, The 674
Salvador v. Hopkins . . . 537
Santler v. Heard . . . 707
Sarah Stout, Case of . . . 195
Satyre v. Minns 500
Saunders v. Nevil . . . 232
Saunderson v. Glass . . . 61
Saunderson v. Rowles . . 476
Savage's Case 29
Savile v. Savile 232
Sayer v. Pocock 498
Sayre v. Rochford (Earl) . . 707
Score v. Lord Admiral . . 457
Scott v. A'Chez 456

	PAGE
Scott v. Shearman	707
Scott v. Shepherd	568, 707
Scott v. Tyler	274, 324
Scott and Alvarez's Contract *in re*	228
Scroggs v. Scroggs	228, 262
Seaford v. Meale and Leonard	231
Seaman v. Fonereau	445
Seaton v. Seaton	301
Seeley v. Jago	200
Seeman v. Seeman	667
Selby v. Bardons	150
Sergeson v. Sealey	268
Sewell v. Burdick	492
Shannon v. Shannon	717
Shaw v. Bull	232
Shaw v. Weigh	441
Sheddon v. Goodrich	150
Sheffield v. Buckinghamshire (Duchess)	290, 698
Shelley's Case	323, 441, 484, 515, 553, 559, 707
Shepherd v. Beecher	212
Shepherd v. Cotton	284
Shermoulin v. Sands	225, 331
Shiells v. Blackburne	575
Shipman v. Thompson	452
Shubrick v. Salmond	519
Shudal v. Jekyll	269
Sibree v. Tripp	435
Silk v. Prime	309
Simms *in re*	544
Simpson v. Vaughan	281
Sinclair v. Brougham	544, 547
Singleton v. Bolton	532
Slade's Case	155
Sloman v. Walter	323
Small v. Nairne	110
Smith v. Abbot	445
Smith v. Bromley	548
Smith v. Clay	234, 308
Smith v. Dovers	490
Smith v. French	273
Smith v. Hibernian Mine Co.	142
Smith (Doe d.) v. Jersey (Earl)	140
Smith v. Johnson	458
Smith v. Kerr	41, 45
Smith v. Lovegrove	669, 691
Smith v. Low	275
Smith v. Milles	488
Smith v. Morris	326
Smith v. Oxenden	230
Smith v. Read	281
Smith v. Richardson	451
Smith v. Smith	274
Smith's Case	442
Snee v. Prescot	282, 283, 548
Snellgrove v. Baily	280
Snow Greyhound, The	699
Solendahl (Baron Von) v. Hampe	689
Sommersett's Case	140, 282, 407, 410, 510
South Sea Co. v. Duncomb	441
Southerton v. Whitlock	440
Southey v. Somerville (Lord)	309
Sparrow v. Carruthers	445
Sparrow v. Hardcastle	261
Spencer v. Hawkins	687
Spencer v. Le Royd	453
Sproat v. Mathews	446
Squib v. Wyn	200
Stace v. Mabbot	263
Stackpole v. Simon	540
Stamma v. Brown	445
Stapleton v. Colville	218
Stapliton v. Stapliton	273
Stationers' Co. v. Partridge	208
Steadman v. Palling	291
Stebbing v. Walkey	328
Steel v. Houghton	575
Stevens v. Webb	690
Stevenson v. Mortimer	543
Stevenson v. Snow	539
Stockdale v. Hansard	580
Stone v. Freeland	504
Stone v. Lingwood	451
Stote v. Tyndall	688
Stotesbury v. Smith	518
Stout (Sarah), Case of	195
Stradling v. Stiles	246
Strathmore v. Bowes	231, 324
Straton v. Rastall	543, 589
Stratton v. Ford	688
Streatfield v. Streatfield	218
Stretch v. Pynn	688
Stringer v. Browne	692
Subley v. Mott	445
Suffell v. Bank of England	567
Suffolk (Earl of) v. Howard	232
Sutton v. Johnstone	511, 566
Sutton v. Mitchell	533
Sutton v. Smith	699
Swann v. Broome	516
Sweetapple v. Bindon	199
Swift v. Roberts	516
Symonds v. Totness (Mayor of)	453
Symons (Heilbert) & Co. v. Buckleton	157

T

	PAGE
Talbot v. Shrewsbury (Duke)	225
Target v. Gaunt	209
Tarlton v. Fisher	523, 524
Tarrant v. Mawr	451
Taylor v. Beach	231
Taylor v. Bowers	549
Taylor v. Horde	373, 447, 515, 553, 557
Taylor v. Taylor	686
Thellusson v. Woodford	156, 329, 490
Thomas v. Baker	688
Thomas v. Bennet	209
Thomas v. Sawkins	717
Thompson v. Hodgson	441
Thornby v. Fleetwood	225, 450, 461

	PAGE
Thornton v. Dixon	327
Thynn v. Thynn	235
Timbrell v. Rice	688
Tindal v. Brown	491
Tinkler v. Poole	137
Tipping v. Tipping	209
Tomlinson v. Gill	273
Tonge v. Watts	445
Toomes v. Conset	278
Toulmin v. Price	596
Towers v. Barrett	520
Towers v. Osborne	436
Townshend v. Windham	261, 279
Trelawney v. Booth	261, 270
Trelawney v. Winchester (Bishop)	516
Trew v. Peirce	670
Trinder v. Watson	555
Triquet v. Bath	467, 510
Trott v. Dawson	209
Trueman v. Fenton	485
Tucker v. Tucker	597
Tucker v. Wilson	203
Tuckfield v. Buller	261
Tudor v. Anson	219
Tuney v. Clarke	452
Turner v. Winter	487, 488, 491
Turton v. Benson	208, 209, 221
Turwin v. Gibson	60, 61
Twisleton v. Griffith	200
Tyrie v. Fletcher	539

U

Ulrick v. Litchfield	281
Underwood v. Gibbon	458
Underwood v. Hitchcock	276, 277
United States v. Motor Trucks	277
Upton v. Pullyn	453

V

Vallejo v. Wheeler	525, 526, 533
Vane v. Barnard (Lord)	235
Veley v. Burder	612
Vernon v. Hankey	488
Vertue v. Clive	511
Vintner's Co. v. Passey	479
Vrow Antoinette, The	693

W

Wait *in re*	605
Waite v. Whorwood	273
Walker v. Gascoigne	236
Wallace v. King	576
Wallis and Pain and Underhill	458
Walmsley v. Booth	61
Walton v. Rider	668
Walton v. Shelley	504, 506, 508, 509
Waples v. Eames	445
Ward v. Creswell	449
Ward v. Lant	194, 549
Ward v. Macaulay	582
Ward v. Reynolds	522
Ward v. Turner	280
Ware v. Johnson	668, 691
Waring v. Danvers	218
Warren v. Consett	461
Warren v. Greenville	132
Warwick v. Warwick	267
Watkins v. Lea	299
Watkinson v. Barnardiston	225
Watson v. Milward	688
Watt v. Watt	451
Watts v. Ball	200
Watts v. Bullas	219
Watts v. Creswell	235
Waugh v. Carver	567, 568
Weakly v. Bucknell	589
Weatherston v. Hawkins	522
Webb v. Claverden	230
Webb v. Russell	581
Welde v. Welde	666, 686
Wescombe v. Dods	668
Westerdell v. Dale	588
Weston v. Downes	520
Wharam v. Broughton	291, 292
Wheatley v. Fowler	691
White v. Warner	515
Whitfield v. Le Despencer (Lord)	485, 511
Whittingham v. Thornburgh	540
Whitton v. Russell	268
Whorewood v. Whorewood	276
Wildman v. Blakes	692
Wilford v. Berkeley	523
Wilke's Case	249, 552
Wilkes v. Holmes	268
Wilkins v. Carmichael	60, 534
Wilkinson v. Lutwidge	454
Wilkinson v. Moss	691
Wilkinson v. Tranmarr	449
Willats v. Clay	276
Willet v. Chambers	70
Williams v. Bosanquet	588
Williams v. Johnson	450
Williams v. Millington	575
Willis v. Jernegan	229, 275
Wills v. Rich	279
Wilson v. Harman	284
Wilson v. Mackreth	476
Wilson v. Smith	528, 532
Winch v. Keeley	589
Winchlow v. Smith	688
Windham v. Chetwynd	467, 508, 509, 516
Winsmore v. Greenbank	450, 454
Wiseman v. Vandeputt	283
Wodehouse v. Farebrother	598
Woodhouse v. Shepley	274
Woods v. Huntingford	142

	PAGE
Woolaston v. Walker	442, 461
Worsley v. Demattos	541
Worsley v. Scarborough (Earl)	267
Worsley v. Worsley	666
Wortley v. Birkhead	257, 266, 267, 278
Wright v. Campbell	533, 541
Wright v. Carter	61
Wright v. Fawcett	501
Wright v. Holford	498
Wright v. Littler	507
Wright v. Nutt	326, 327

Y

	PAGE
Yard v. Ford	506
Yates v. Hall	477, 489
Yong Vrow-Adriana, The	693
Young v. Lawrence	692

Z

Zamora, The	654
Zouch v. Parsons	518
Zouch v. Woolston	482

LIST OF STATUTES

	PAGE
13 Edward I. St. 1 c. 3	481
25 ,, III. St. 5 c. 2	362
22 Henry VIII. c. 4	397
27 ,, ,, c. 16	267
28 ,, ,, c. 15	679
32 ,, ,, c. 1	187, 383
1 Edward VI. c. 2 s. 4	711
1 Elizabeth c. 19	516
5 ,, c. 4	397
,, ,, c. 14	439
13 ,, c. 10 s. 3	48
,, ,, c. 10 s. 5	48
14 ,, c. 11 ss. 17 and 19	48
27 ,, c. 4	516
43 ,, c. 4	203
1 James I. c. 4	450
3 ,, ,, c. 7	53, 55
3 Charles I. c. 2	450
13 Charles II. St. 1 c. 12 s. 4	679
14 ,, ,, c. 33 s. 3	113
19 ,, ,, c. 2	47
22 ,, ,, c. 11 ss. 32, 33	47
29 ,, ,, c. 3 ss. 5, 6, 19, 20, 22, 23	187, 268
,, ,, ,, c. 3 ss. 19-24	658, 687
1 William and Mary c. 18	714
7, 8 William III. c. 34 s. 6	508
8, 9 ,, ,, c. 11 s. 8	519
9 ,, ,, c. 15	392
9, 10 ,, ,, c. 32	621, 622
,, ,, ,, c. 41 s. 6	687
10, 11 ,, ,, c. 14 s. 1	308
11 ,, ,, c. 4 s. 4	281
12, 13 ,, ,, c. 3	432
3 Anne c. 13	457
4, 5 ,, c. 16 s. 13 (R.C. c. 3)	456, 584
,, ,, c. 16 s. 4	501
,, ,, c. 16 s. 8	495
6 ,, c. 37 ss. 4-8	683
7 ,, c. 10	218
,, ,, c. 20	267
,, ,, c. 21	362
,, ,, c. 25	362
12 ,, St. 2 c. 7	196
1 George I. St. 2 c. 5	196
5 ,, ,, c. 4	197
,, ,, ,, c. 5	197
12 George I. c. 29 s. 4	54
,, ,, ,, cc. 32 and 33	213
2 George II. c. 22 s. 13	452
,, ,, ,, c. 23	54, 402
,, ,, ,, c. 23 ss. 1 and 3	54
,, ,, ,, c. 23 ss. 2, 4, 6, 8	54
,, ,, ,, c. 23 ss. 5 and 7	55
,, ,, ,, c. 23 s. 10	57
,, ,, ,, c. 23 ss. 10, 20, 21	51
,, ,, ,, c. 23 s. 11	55
,, ,, ,, c. 23 s. 12	55
,, ,, ,, c. 23 ss. 13, 14	54
,, ,, ,, c. 23 s. 15	55
,, ,, ,, c. 23 s. 16	57
,, ,, ,, c. 23 s. 17	55
,, ,, ,, c. 23 s. 18	55
,, ,, ,, c. 23 s. 22	55
,, ,, ,, c. 23 s. 23	55
,, ,, ,, c. 23 s. 24	55
,, ,, ,, c. 23 ss. 26 and 27	57
,, ,, ,, c. 23 s. 28	12, 57
,, ,, ,, c. 24	402
,, ,, ,, c. 32	402
3 ,, ,, c. 25 s. 14	495
,, ,, ,, c. 30	185, 213
4 ,, ,, c. 21 s. 2	347
,, ,, ,, c. 26	214, 356, 359, 360
,, ,, ,, c. 28 ss. 3 and 4	584
5 ,, ,, c. 25	292
,, ,, ,, c. 25 s. 8	293
6 ,, ,, c. 14 ss. 3 and 5	360
,, ,, ,, c. 27	55
7 ,, ,, c. 15	533
,, ,, ,, c. 20	584
9 ,, ,, c. 23	220
,, ,, ,, c. 36	220
11 ,, ,, c. 19 ss. 12 and 13	481
12 ,, ,, c. 13 ss. 1 and 3	56
,, ,, ,, c. 13 s. 4	55
,, ,, ,, c. 13 s. 5	56
,, ,, ,, c. 13 s. 6	55
,, ,, ,, c. 13 s. 7	56
,, ,, ,, c. 13 s. 9	54
,, ,, ,, c. 13 s. 10	54
13 ,, ,, c. 4	683
17 ,, ,, c. 34	683
19 ,, ,, c. 37 s. 1	539
20 ,, ,, c. 34	221
21 ,, ,, c. 4	539
22 ,, ,, c. 46 ss. 3-6	55

	PAGE
22 George II. c. 46 s. 7	55
,, ,, ,, c. 46 ss. 8 and 10	55
,, ,, ,, c. 46 s. 11	55
,, ,, ,, c. 46 s. 12	54, 56
,, ,, ,, c. 46 s. 14	58
,, ,, ,, c. 46 s. 16	57
23 ,, ,, c. 26 s. 15	51
26 ,, ,, c. 33	685
27 ,, ,, c. 7	397
29 ,, ,, c. 34	683
30 ,, ,, c. 24	440
32 ,, ,, c. 35 s. 9	251
1 George III. c. 17 s. 31	54
9 ,, ,, c. 16	309
14 ,, ,, c. 48	539, 540
,, ,, ,, c. 48 s. 1	539
16 ,, ,, c. 5	674
17 ,, ,, c. 26	397
18 ,, ,, c. 60	474
19 ,, ,, c. 67	683
,, ,, ,, c. 74	708
22 ,, ,, c. 25	535
,, ,, ,, c. 75	578
23 ,, ,, c. xxx	48
,, ,, ,, c. 39	350
27 ,, ,, c. 7	676
31 ,, ,, c. 32 s. 22	372
32 ,, ,, c. 60	307
33 ,, ,, c. 27	539
,, ,, ,, c. 66	683
,, ,, ,, c. 66 s. 36	535
39 ,, ,, c. 67	6
,, ,, ,, c. 113	6
43 ,, ,, c. 160	683
44 ,, ,, c. 98 s. 14	26
53 ,, ,, c. 127 ss. 8 and 9	76
9 George IV. c. 14 s. 7	436
44 ,, ,, c. 98 s. 14	72
3, 4 William IV. c. 74	416, 603
7 William IV. and 1 Victoria c. 26	667, 689
1 Victoria c. 26 ss. 18, 23, 28, 33	515
1, 2 Victoria c. 110 s. 19	380
2, 3 ,, c. 11	380
3, 4 ,, c. 65	684
,, ,, c. 65 ss. 4-6, 22	684, 693
,, ,, c. 65 ss. 7, 10, 11, 13-15	684
,, ,, c. 65 s. 18	684
6, 7 ,, c. 73 s. 46	58
8, 9 ,, c. 106 s. 4	559
17, 18 ,, c. 47	684
,, ,, c. 125	598
20, 21 ,, c. 77 s. 29	684
,, ,, c. 77 s. 23	689
,, ,, c. 77 s. 30	684
,, ,, c. 77 ss. 40-42	6, 9
,, ,, c. 77 ss. 116, 117	40
,, ,, c. 85	686
,, ,, c. 85 s. 22	684
,, ,, c. 85 s. 53	684
22, 23 ,, c. 6	6, 9
23, 24 ,, c. 144 s. 7	12
27, 28 ,, c. 25 ss. 16-33	683
31, 32 ,, c. 109	691
36, 37 ,, c. 31	12
,, ,, c. 66 s. 12	30
,, ,, c. 66 s. 25	602
,, ,, c. 66 s. 87	54
45, 46 ,, c. 61 s. 49 (12)	491
,, ,, c. 75 s. 19	326
47, 48 ,, c. 71	586
,, ,, c. 71 s. 4	303
51, 52 ,, c. 65	58
56, 57 ,, c. 21	516
6 Edward VII. c. 41	536
15 George V. c. 20 s. 131	515, 559
15, 16 ,, ,, c. 20 s. 177 (1)	516
,, ,, ,, c. 21	380
,, ,, ,, c. 22	380
,, ,, ,, c. 23 s. 45 (*d*) 46 (i) (vii)	303, 304
,, ,, ,, c. 49 s. 18 (3)	30
25, 26 ,, ,, c. 30	326, 582

BOOK V (*Continued*)

(1701-1875)

THE CENTURIES OF SETTLEMENT AND REFORM

PART I

SOURCES AND GENERAL DEVELOPMENT
(*Continued*)

CHAPTER III

THE EIGHTEENTH CENTURY (*Continued*)

The Professional Development of the Law

NEARLY all the important developments in Private Law, and many of the important developments in Public Law, were due, not to the Legislature, but to the lawyers. The Chancellors, the judges, and the civilians of Doctors' Commons settled the principles of equity, of the common law, and of ecclesiastical and admiralty law, on the lines upon which they had begun to develop in the latter half of the seventeenth century; and, in some cases, they began the task of adapting them to the new social and economic conditions which were beginning to prevail in the last thirty years of the century. They accomplished this work mainly through the decisions of the courts. In the eighteenth century, equity, like the common law, had become a system of case law; and at the end of the century there are signs that both the ecclesiastical and the admiralty law will be developed in the same way. To a considerable extent this work was assisted by those lawyers who summed up the results of the cases in abridgments and text-books. Some of these lawyers were also judges, so that they helped to shape the law both by their decisions and their books. The most notable of the lawyers who helped to shape the law both as a judge and as an author was Blackstone, whose Commentaries were the first literary account of English law as a whole that had ever been written since Bracton had composed his unfinished treatise in the first half of the thirteenth century. They give us the best picture of the effects upon English law of the work of the Legislature and of the lawyers during the

first seventy years of the eighteenth century. With this professional development of the law I shall deal under the following seven heads: the Legal Profession; the Reports and the Abridgments; Equity; the Common Law; the Relations between Law and Equity; the Sphere of the Civilians' Practice; Blackstone and his Commentaries.

I

The Legal Profession

I shall deal, in the first place, with the ranks of the legal profession; in the second place, with its organization and discipline; and, in the third place, with the manner in which its members were educated in the theory and practice of the law.

The Ranks of the Legal Profession

In the eighteenth century the order of precedence "which usually obtains among the practisers" was, Blackstone tells us,[1] as follows:

"1. The king's premier serjeant (so constituted by special patent).
2. The king's antient serjeant, or the eldest among the king's serjeants.
3. The king's advocate-general.
4. The king's attorney-general.
5. The king's solicitor-general.
6. The king's serjeants.
7. The king's counsel with the queen's attorney and solicitor.
8. Serjeants at law.
9. The recorder of London.
10. Advocates of the civil law.
11. Barristers." [2]

The numbers of these various members of the legal profession were not large. According to Browne's *General Law List* for 1779,[3] there were 15 King's counsel, 11 serjeants, 203 counsel all of whom lived in London, and 12 advocates.

I have already said something of some of these members of the legal profession. We have seen that the position of the

[1] Comm. iii 28 n. (*a*).

[2] Blackstone, loc. cit., also mentions the postman and tubman who had a precedence in making motions in the court of Exchequer, see vol. i 234 n. 4.

[3] This was the third edition, so that the first was apparently published in 1776; Browne's list was unofficial; he is said to have been an apothecary who annoyed his neighbours by working his press on Sundays, Christian, A Short History of Solicitors 117 n. 2.

King's serjeants, the other serjeants, and the barristers had been ascertained and fixed in the Middle Ages;[1] that the attorney and solicitor-general had come to be the principal law officers of the Crown in the sixteenth century;[2] and that the King's counsel, originally assistants to the attorney and solicitor-general,[3] were ceasing to be their assistants, and were coming to be a new order in the legal profession,[4] which was threatening the position of the serjeants.[5] We have seen also that the conditions under which advocates were admitted to practise in the ecclesiastical courts, the court of Admiralty, and the other courts which administered the civil law, had been settled in the sixteenth century;[6] and that they had attained a professional organization in Doctors' Commons, just as the common lawyers had attained a professional organization in the Serjeants' Inns, the Inns of Court, and the Inns of Chancery.[7] At this point I must say something of the reasons for some of the features of this order of precedence in the ranks of the legal profession, which had come to be recognized in the eighteenth century.

The reasons for some of these features are fairly obvious. Those who represented the King in his courts must obviously be given precedence over those who represented ordinary litigants; and amongst those who represented the King the King's specially appointed representatives from amongst the order of the serjeants must come first. The serjeants were still regarded as the highest order in the profession; and, in theory, they alone were qualified to hold judicial office in the common law courts.[8] And just as the King's specially appointed representatives from amongst the order of the serjeants took precedence of the King's attorney and solicitor-general by virtue of their seniority, so for the same reason the King's serjeants took precedence of the King's counsel. On the other hand, the King's counsel took precedence of the ordinary serjeants, because they had originally been appointed to assist the King's attorney and solicitor-general. The position of the recorder of London is probably to be explained by the great importance of the officials of the City of London, and their close connection and intimate relations with the government of the state.[9] But

[1] Vol. ii 485-492, 504, 506-508.
[2] Vol. vi 457-472.
[3] Ibid 472-475.
[4] Ibid 475-476.
[5] Ibid 477-478.
[6] Vol. iv 236; below 47.
[7] Vol. iv 235-237; below 14, 15, 40.
[8] Vol. i 197; vol. ii 485; vol. vi 478; below 6; the old solemnities on a call of serjeants were still observed, Calendar of Inner Temple Records iv 114-116; in 1736 the question of the precedence in the procession of the serjeants to Westminster gave rise to a controversy between the two Temples, which was argued before the Lord Chancellor and the two Chief Justices, ibid 325-330.
[9] Vol. x 240.

though these features in the ordering of the ranks of the legal profession can be explained historically, they represented an order of things which was rapidly growing obsolete in the eighteenth century. The rule that the judges must be appointed from the order of the serjeants had, from the sixteenth century onwards, been evaded by making the lawyer who was to be raised to the bench a serjeant for that purpose ;[1] and at the end of the century a statutory recognition was in effect given to this evasion. In 1799 it was found necessary to appoint a judge in the vacation. But since the Crown did not wish to appoint any of the existing serjeants, and since a serjeant could only be created in term time, an Act was passed empowering the Crown to make a serjeant in the vacation, whenever it was wished to appoint a judge during that period.[2] The leaders of the profession were no longer the serjeants, but the King's attorney and solicitor-general, and the King's counsel.[3] In 1814 recognition was given to the position which the King's attorney and solicitor-general had long held, by an order of the Prince Regent, which gave them precedence over the King's premier and the King's ancient serjeant.[4]

The reasons for some of the other features in this ordering of the ranks of the legal profession are not altogether obvious ; and of them I must say a few words.

First, it will be observed that the civilians take a high place. The King's advocate-general comes after the King's premier and the King's ancient serjeant ; but he comes before the King's attorney and solicitor-general ; and, similarly, the ordinary advocates come after the serjeants, but before the ordinary barristers. The King's advocate continued to take precedence of the King's attorney and solicitor-general till 1862 ;[5] and the ordinary advocates over barristers until both, by statutes of 1857 and 1859, were merged in one order.[6]

[1] Vol. v 340-341 ; vol. vi 478.

[2] 39 George III c. 113 ; a special Act had been passed earlier in the session (39 George III c. 67) to enable the Crown to make Alan Chambre a serjeant in order that he might be appointed a baron of the Exchequer, Foss, Judges viii 200 ; the first appointment under the general Act was that of John Scott, Lord Eldon, to the office of Chief Justice of the Common Pleas, ibid.

[3] Vol. vi 470-472, 477-478.

[4] Ibid 477 n. 6 ; Foss, Judges viii 220, says that the immediate reason for this order was the fact that, if it had not been made, Shepherd, the newly appointed solicitor-general, being one of the two most ancient of the King's serjeants, would have taken precedence over the attorney-general.

[5] Encyclopædia of the Laws of England, tit. *King's Advocate ;* the office was not filled after the resignation of Sir Travers Twiss in 1872 ; his emoluments were very much less than those of the attorney and solicitor-general—in 1826 his salary was £20 and his fees £3,094, and in 1827 his salary was the same and his fees £2,449, Parlt. Papers 1830 xix 552.

[6] 20, 21 Victoria c. 77 §§ 40-42—the ecclesiastical courts ; 22, 23 Victoria c. 6—the court of Admiralty.

Probably the King's advocate took precedence of the King's attorney and solicitor-general, because advocates, whether employed by the King or by private persons, were always in later days,[1] and often in the Middle Ages, doctors of law.[2] Advocates were therefore on a level with the serjeants—Fortescue, as we have seen, equated the status of a serjeant with that of a doctor.[3] They were therefore superior to an attorney or a solicitor—even to a King's attorney or solicitor-general. This conjecture is the more probable because the King's advocate cannot have taken precedence of the King's attorney or solicitor-general by virtue of the greater antiquity of his office. It is true that, from an early date, the King employed persons learned in the civil and canon law to conduct his business in the court of Admiralty and the ecclesiastical courts,[4] just as he employed his serjeants and attornies in the common law courts; and it is true that, as early as 1430, a body of advocates who practised in the court of Admiralty was in existence.[5] But it is probable that the King was employing a single attorney-general to appear for him in the courts before he employed a single advocate-general. We see very little sign of an advocate-general before 1482,[6] whereas we get an attorney-general considerably earlier.[7] But it should be noted that both in the common law courts and in the court of Admiralty and the ecclesiastical courts we can see the same development—the substitution for several representatives with a limited authority of a single official with a general authority. No doubt the same reasons which caused the King's advocate to take precedence of the attorney and solicitor-general, caused

[1] Vol. iv 236; below 47.

[2] Vol. iv 230-232; the letters patent on the Patent Rolls of the fifteenth century addressed to commissioners to hear Admiralty appeals generally contained doctors of civil or canon law or bachelors of law, see the indices to the printed calendars *sub voc. Admiralty;* cp. Senior, Doctors' Commons and the Old Court of Admiralty 33-34.

[3] De Laudibus c. 50, cited vol. ii 486; if the requirement of a doctor's degree had not barred the way Dr. Johnson might have become an eminent civilian, Boswell, Life of Johnson (ed. 1811) i 106 (1738).

[4] Vol. iv 231 n. 5; Senior, op. cit. 6-7, 29-30.

[5] A suit was begun before the Admiral's deputy "in the parts of Norfolk and Suffolk"; but, since the defendant could not find a counsel there, the case was remanded to the court of Admiralty at Southwark, "where counsel are in plenty," ibid 32, citing Cal. Patent Rolls, July 18, 1430.

[6] In 1482 the King grants to Robert Rydon "the office of king's promoter of all causes, criminal and civil, or concerning crimes of *lese majestie*, before the king's judges of the constableship and admiralty of England with all accustomed profits and 20 marks yearly from the receipt of the Exchequer," ibid 54, citing Cal. Patent Rolls, Oct. 23, 1482; this looks as if there had been earlier grants, but I have not found any in the printed Calendars; in the following year the same office was granted to Master William Buller for life, ibid, citing Cal. Patent Rolls, Dec. 10, 1483; note that in later days the salary of the King's advocate was £20, above 6 n. 5.

[7] Vol. vi 460.

the ordinary advocates to take precedence of the ordinary barristers. As doctors of law their status was analogous to that of a serjeant,[1] whereas the call to the bar gave a status which was more analogous to the inferior degree of bachelor.[2]

Secondly, in this list of the ranks of the legal profession no mention is made of its most numerous branch [3]—the attornies and solicitors who practised in the courts of common law and equity, and the proctors who performed similar functions in the ecclesiastical courts and the court of Admiralty. We have seen that, in the seventeenth century, attornies and solicitors had become a definite order in the legal profession, which the Legislature had begun to regulate; and that their relation to the bar was beginning to take its modern form.[4] We shall see that during this century they were further regulated by the Legislature and the courts,[5] and that they had begun to organize themselves,[6] with the result that they had come to hold in the legal profession substantially the status which they hold to-day. The proctors, who performed analogous duties in the ecclesiastical courts and the courts of Admiralty, had a history somewhat similar to that of the attornies and solicitors. Proctors, like attornies,[7] were appointed solemnly, by a warrant called a proxy, to represent the parties to a suit; [8] and a proctor, like an attorney, was, when appointed, *dominus litis*.[9] Probably at first a proxy could be given to anyone; but certainly as early as the beginning of the seventeenth century, the proctors had become a definite class of legal practitioners, who acted for their principals, and took for them the steps necessary to start and keep in motion the complicated procedure of the court. Nevertheless they were not regarded as persons learned in the law; and in 1603 it was enacted that no proctor "shall entertain any cause whatsoever, and keep and retain the same for two court days without the counsel and advice of an advocate." [10] No judge was to admit any libel without the advice and subscription of an advocate, and a proctor was not to conclude any cause without the advice of the advocate whom he had retained. They were to behave quietly and modestly in court, and "where either the judges or advocates . . . shall happen to speak they [must] presently be silent upon pain of silencing two whole

[1] Above 7 n. 3.
[2] Vol. iv 230.
[3] According to Browne's Law List for 1779 there were 1,087 London attornies and solicitors, 2,040 country attornies and solicitors, and 46 proctors.
[4] Vol. vi 432-444, 448-457.
[5] Below 52-62.
[6] Below 63 seqq.
[7] Vol. ii 315-316.
[8] Burn, Ecclesiastical Law (9th ed. by R. Phillimore iii) 376.
[9] Ibid; Dr. Andrews *arg.* in the case of Andrews v. Powis (1728) 1 Lee, at p. 248, said, "the confession of a counsel cannot bind a party; the confession of a proctor does, because he is dominus litis"; for the similar position of an attorney see vol. ii 311-312.
[10] Canon 130, cited Burn, op. cit. iii 378.

terms." [1] We shall see that they were regulated partly by the ordinances of the archbishop of Canterbury,[2] and partly by the courts before which they practised; [3] and that the conditions under which they were admitted to practise were analogous to the rules laid down for attornies and solicitors.[4] In fact, it may well be that the analogous rules laid down for these very similar classes of legal practitioners in the seventeenth and eighteenth centuries, exercised a reciprocal influence over one another. Whether that is so or not, it is clear that the analogy between them and the attornies and solicitors was as striking as the analogy between the advocates and the barristers. For this reason it was easy for the Legislature to merge the proctors with the attornies and solicitors, at the same time as it merged the advocates with the barristers.[5]

Thirdly, though the first seven classes in Blackstone's order of precedence comprise persons who represented the King in litigation, these classes do not comprise all the members of the legal profession who were employed to represent the King or his government. In fact, just as there had been considerable developments in the creation and organization of departments of the central government during the eighteenth century,[6] so there had been considerable developments in the way in which the King or the departments of his government were represented in his courts. Of these developments I must at this point say a few words.

The King's premier serjeant, the King's ancient serjeant, and the attorney and solicitor-general represented the King, and through the King the state, in the courts of law and equity.[7] The King's advocate represented the King in the ecclesiastical courts and the court of Admiralty; [8] and he was frequently consulted by the foreign office,[9] and by the colonial or India

[1] Canons 131, 133, cited Burn, op. cit. iii 381.
[2] Below 76. [3] Below 76-77. [4] Below 76.
[5] 20, 21 Victoria c. 77 §§ 40-42; 22, 23 Victoria c. 6; above 6.
[6] Vol. x 487-499.
[7] "The attorney-general is an officer of the Crown, and in that sense only, an officer of the public," Attorney-General v. Brown (1818) 1 Swanst. at p. 294, *per* Lord Eldon C.; in R. v. Wilkes (1770) 4 Burr. at p. 2570 Yates J. distinguished between the attorney-general and the master of the Crown Office—the former, he said, was a servant of the King, the latter of the public.
[8] Encyclopædia of the Laws of England, tit. *King's Advocate*.
[9] In 1877 Dr. Deane told the committee appointed to enquire into the conduct of the legal business of the government, that the Queen's Advocate used to go to the Foreign Office and give his advice personally without any papers being sent—"that was the practice in Sir John Nichol's time and in Sir John Dodson's time; I can speak to that pretty well from what Sir John Dodson has told me. The practice was, that they used to be constantly sent for by the minister of the day, and the thing used to be talked over between them, and in many matters where papers were sent, the exception was to send them to anybody but the Queen's Advocate," Parlt. Papers 1877 xxvii 35; this was probably a practice inherited from the eighteenth century.

offices, through the foreign office, on questions of international law.[1] Though the King's counsel and the King's serjeants had once been assistants to these officials, they had in the eighteenth century ceased to represent the King;[2] their former position was recalled only by obsolete rules, such as the rule that a King's counsel could not appear against the Crown without its consent;[3] and they had thus become merely a rank in the legal profession which took precedence over the ordinary barristers.

The King was not the only person who was represented by an attorney and solicitor-general. The Queen Consort was similarly represented,[4] and her attorney and solicitor took rank with the King's counsel.[5] The King also, in his capacity of duke of Lancaster, was represented by an attorney-general for the duchy;[6] and the Prince of Wales and duke of Cornwall was represented by his attorney-general for the duchy.[7] In fact, not only the King, Queen, and Prince of Wales, but also the lords of the great franchise jurisdictions, such as the bishop of Durham[8] and the bishop of Ely,[9] were represented by their attorneys-general. The position of the lawyers who represented the King, the Queen, and the Prince of Wales in the courts had been substantially fixed before the beginning of the eighteenth century. The developments which took place in that century in the representation of the Crown were concerned, not so much with the lawyers who represented the King, the Queen and the Prince of Wales, as with the lawyers who represented the departments of government.

In the eighteenth century the increase in the business of the state made it impossible for the attorney and solicitor-general to attend to the business of all the departments of state. In 1718 the increase of colonial business caused the appointment of a standing counsel to the Board of Trade.[10] Richard West

[1] Parlt. Papers 1877 xxvii 35. [2] Vol. vi 476.

[3] Ibid 476 n. 4, and Bl. Comm. iii 28 there cited; it was both for that reason, and because the acceptance of the office of King's counsel vacated a seat in the House of Commons, that barristers, instead of taking this office, got patents of precedence, which entitled them to similar precedence in the courts, ibid; for licences to plead given by the Crown see Calendar of Home Office Papers 1760-75; there is only one case in which an objection was made to the grant of such a licence, ibid 1760-65, 293.

[4] Sir Robert Floyde's Case (1619) 2 Roll. Ab. 213; see also the other authorities cited by Robertson, Civil Proceedings by and against the Crown 6.

[5] Above 4. [6] Robertson, op. cit. 16.

[7] Ibid 7-8; see Attorney-General to Prince of Wales v. St. Aubyn (1811) Wight. at p. 178, where it is said that no patents granting the office, prior to 10 James I, were to be found in the Duchy Office; he is mentioned in The Prince's Case (1606) 8 Co. Rep. at f. 16a as arguing on behalf of the King.

[8] Lapsley, County Palatine of Durham 179-180—the first appearance of the bishop's attorney-general is in 1307, ibid 179 n. 4.

[9] Attorney-General to Prince of Wales v. St. Aubyn (1811) Wight. at p. 170.

[10] "Soon after the accession of George I the Acts of the Colonial Assemblies, which were to be reviewed, became extremely voluminous; the standing fee of

was the first holder of the office; and his three successors were Francis Fane, Matthew Lamb, and Richard Jackson.[1] Jackson discharged the duties of that office till the Board was abolished in 1782;[2] and for a short time after 1782 the secretary of state employed a counsel to advise him as to the course to be pursued with regard to colonial Acts of Assembly.[3] In the course of the nineteenth century many government departments acquired their own legal departments, or their standing counsel.[4] Junior counsel to the Treasury were appointed to give the assistance to the attorney and solicitor-general, which was given by the King's counsel in the seventeenth century;[5] and standing counsel were appointed to assist both the lord chairman of committees and the Speaker.[6] In the Admiralty the Lord High Admiral had his advocate;[7] and in cases in which there was a contest whether a ship was a droit of the Admiralty or a droit of the Crown,[8] the King's advocate and the Admiralty advocate sometimes represented opposing interests.[9]

But the developments which took place in the representation in the courts of the departments of state were made principally in the lower, and not in the higher, branches of the legal profession. Just as Blackstone in his table of precedence omits all reference to the attornies, solicitors, and proctors, so he omits all reference to those members of the legal profession who performed for the Crown or the departments of state those services in the courts which these attornies, solicitors, and proctors performed for private persons.

We have seen that, in the seventeenth century, there was a solicitor of the Exchequer or Treasury solicitor, who performed these services for the Crown.[10] He was a confidential agent of the Treasury; and the committee of secrecy of the House of Commons, which was appointed in 1742 to enquire into the conduct of Robert Walpole, tried in vain to extract

a hundred guineas had ceased to be any object to the Attorney and Solicitor-General: and it became apparent that advice was at length asked on particular business of such magnitude as a fee of a hundred guineas was quite unequal to the affairs and income of the law officers of the crown, from other sources. Thus the progress of business led on to the special appointment of one of the King's learned counsel, to attend to the law affairs of this colonial department," Chalmers, Opinions of Eminent Lawyers, Pref. i xi-xii.

[1] Ibid xii. [2] Vol. xi 71-72. [3] Chalmers, op. cit. i xviii.

[4] Below 2 n. 13. [5] Vol. vi 475.

[6] Erskine May, Parliamentary Practice 689 nn. 2 and 4; the lord chairman got his standing counsel soon after 1800: the Speaker, in consequence of the report of a select committee, in 1838.

[7] Encyclopædia of the Laws of England, tit. *King's Advocate*.

[8] For these droits see vol. i 559-561.

[9] See e.g. the Rebeckah (1799) 1 C. Rob. 227.

[10] Vol. vi 476 n. 5; the office dates, Sir Thomas Heath tells us, " from at least 1655," The Treasury (Whitehall Series) 186.

from Paxton, the then solicitor to the Treasury, evidence as to the financial dealings of Walpole while he was first lord of the Treasury and chancellor of the Exchequer.[1] The holder of the office was a solicitor by profession, and allowed to practise privately; but, since 1806, he has been a barrister and has been precluded from private practice.[2] In 1746 the office of assistant solicitor was created "in consequence of the number of state trials then in progress."[3] Similarly, the Duchy of Lancaster and the Duchy of Cornwall have their solicitors.[4] At the end of the seventeenth century there was a solicitor to the Customs;[5] and in 1729 not only the Treasury and the Customs, but also the Excise, the Post Office, the Salt duties, and the Stamp duties had their solicitors.[6] The council for the affairs of the Admiralty had its assistant who acted as a solicitor;[7] and it is noteworthy that, just as the recorder of London was given a position next after the serjeants,[8] so the solicitor to the City of London was, like the solicitors to these government departments, exempted from the rules as to admission which the Legislature made for ordinary solicitors.[9] Similarly, in the ecclesiastical courts and the court of Admiralty the King had his proctor.[10] Sir Thomas Heath says:[11]

> His duties may be inferred from the following extract from the Royal Warrant of August 2nd 1876, appointing Mr. Stephenson, the Treasury Solicitor, to be "Our Procurator in all causes and matters, maritime, foreign, civil, and ecclesiastical, whatsoever, which do or in any way may concern Us or Our interests, rights and prerogatives, or in any way belonging to Us, and that are, shall, or may be agitated, depending, or come in question in our Courts of Admiralty, or any Ecclesiastical Court, or before the Judicial Committee of Our Privy Council, or touching any manner of prizes and causes, civil and ecclesiastical, whatsoever."

Just as the Admiralty had its advocate, so also it had its proctor.[12]

[1] Parlt. Hist. xii 625-631. [2] Heath, The Treasury 186.
[3] Ibid; till 1794 there were joint solicitors but only one of them acted, ibid.
[4] Robertson, Civil Proceedings by and against the Crown 20.
[5] Vol. vi 476 n. 5, and Luttrell's Diary iii 507 there cited.
[6] 2 George II c. 23 § 28; E. Hughes, Studies in Administration and Finance, 221.
[7] Ibid; for an account of the fees paid to counsel and doctors of law by Mr. Whitaker, solicitor to the Admiralty and Navy, see S.P. Dom. 1702-1703, 315-316.
[8] Above 4. [9] 2 George II c. 23 § 28.
[10] In 1702 Thomas Smith was appointed King's Proctor "in all causes and matters maritime, foreign, civil and ecclesiastical whatsoever which do or any way may concern us, or our interest, rights, or prerogatives, and also in matters of prize," S.P. Dom. 1703-1705, 503; Parlt. Papers 1877, xxvii 23-24; his fees in 1826 amounted to £1,462 6s. 0d., and in 1827 to £1,007 4s. 11d., Parlt. Papers 1830 xix 552; his functions in relation to divorce and nullity suits, which are now the best-known feature of his duties, were imposed by 23, 24 Victoria c. 144 § 7, and 36, 37 Victoria c. 31. [11] The Treasury 188.
[12] In the law list of 1778 the Admiralty proctor was a Mr. Gosling.

The reason why these developments in the representation in the courts of the departments of state took place in the lower, rather than in the higher, branches of the legal profession, was perhaps due to the fact that the attorney-general could claim to represent the Crown in all important cases; and to the fact that in cases, to which he could not attend personally, he naturally claimed to have some say as to the persons who should be appointed to act as his deputies.[1] On the other hand, he was not directly concerned in the appointment of the persons who got up the case for the department, and prepared the cases for opinion of the law officers, and the briefs for the cases which were to be argued in the courts. It was therefore more easy for the departments of state, when their legal side developed, to acquire an official or officials which did the work of a solicitor, than to acquire an official or officials which did the work of a barrister. Whether or not this is the reason, there is no doubt that it was in this direction that the machinery for the legal representation of the departments of state mainly developed. In 1877 there were eight departments besides the Treasury which had legal departments of their own.[2] But there is no doubt that the Treasury and its solicitor had always had the largest share in the management of the legal business of the departments of state; and that the solicitor to the Treasury was the most important of all these departmental solicitors. In 1877 he was acting for sixteen departments besides the Treasury.[3] It was only natural that he should gradually absorb the work done by most of these departmental solicitors; and that, after the Probate, Divorce, and Admiralty courts had been merged in the supreme court of Judicature, that he should absorb the work formerly done by the King's proctor.[4]

The effect of this concentration seems to be, to a large extent, a restoration to him of duties which he used to discharge in the seventeenth and eighteenth centuries, but which, towards the close of the latter century, were divided among a variety of legal officers.[5]

[1] In 1877 Sir Augustus Stephenson, solicitor to the Treasury, said that, up till then, the attorney-general appointed the standing counsel to the government departments, and those who were briefed in particular cases, Parlt. Papers 1877 xxvii 45; he added that he had not found any practical evil arising from this practice, ibid 46.

[2] The Office of Works, the Office of Woods, the Board of Trade, the War Office, the Admiralty, the Board of Inland Revenue, the Board of Customs, the General Post Office, ibid 59-68.

[3] The Foreign Office, the Colonial Office, the Home Office, the Privy Council Office, the Board of Trade, the Paymaster-General's Office, the Privy Seal Office, the Stationery Office, the Public Record Office, the Registrar-General's Office, the London Gazette Office, the Commissioners of Chelsea Hospital, the Mint, the Inspector of Prisons, the Lord Chamberlain's Office, the Queen's Prison, ibid 86.

[4] Heath, The Treasury 187, 188-189.

[5] Ibid 187; but, as we have seen, above 12, the process of division had begun early in the eighteenth century.

Blackstone, in his table of precedence, naturally says nothing of another class of persons who have always been, and must always be, of great importance to the legal profession—the inner-barristers or students of the law. Of their position in the legal profession during the eighteenth century I shall say something under the two following heads.

The Organization and Discipline of the Legal Profession

The judges and serjeants were organized in the Serjeants' Inns; and the King's counsel, barristers, and students who were preparing for the bar were organized in the Inns of Court and Chancery. It was through the Inns of Court, assisted by the judges, that discipline was exercised over all their members—both students and practitioners. Similarly, the advocates, who practised in the ecclesiastical and Admiralty courts, were organized in Doctors' Commons. The attornies and solicitors were organized and disciplined partly by the Legislature, partly by the judges acting either under statutory powers or by virtue of their jurisdiction over the officers of their courts, and partly by an informal body called "the Society of Gentlemen Practisers in the Courts of Law and Equity," which, as we shall see, was formed and developed in the eighteenth century. The proctors, who practised in the ecclesiastical courts and the court of Admiralty, were organized and disciplined partly by the ordinances issued by the archbishop of Canterbury, and partly by the courts before which they practised. I shall therefore deal with the organization and discipline of the legal profession under the following heads: the Serjeants' Inns; the Inns of Court and Chancery; Doctors' Commons; the Attornies and Solicitors; the Proctors.

The Serjeants' Inns.

Of these Inns I need say very little. We have seen that there were originally two of these Inns—one in Fleet Street, which the serjeants held on lease from the Dean and Chapter of York till the lease was surrendered in 1758; and the other in Chancery Lane, which they held on lease from the see of Ely.[1] The freehold of the Inn in Chancery Lane was purchased by the serjeants in 1834;[2] and it continued to be the Serjeants' Inn

[1] Vol. ii 492 n. 2 and the references there cited; for some particulars of the site of these Inns see E. Williams, Early Holborn and the Legal Quarter of London ii, section 34.

[2] The money was raised on mortgage by the members of the Inn; it was to be paid off by contributions from old and new members, in a way similar to that adopted by the serjeants of the Fleet Street Inn when they rebuilt their Inn after the Fire of London in 1666; see Dugdale, Orig. Jurid. 326-327, and Pulling, Order of the Coif, 126 nn. 1 and 2.

till, as a result of the Judicature Acts, the order of the serjeants was doomed. The Inn and its effects were then sold, and the proceeds were distributed amongst the existing serjeants.[1] In 1715 the serjeants and judges were contemplating the building of a new Serjeants' Inn on the western side of Gray's Inn Walks.[2] Gray's Inn was prepared to grant the necessary ground for a term of a thousand years at a yearly rent of twenty shillings.[3] But the project hung fire and was eventually abandoned.

When the serjeants were really the leaders of the bar, and when the judges were really appointed from their order,[4] their Inns were meeting places at which cases were discussed, and problems relating to the organization and discipline of the profession were considered; for their members, whether on the bench or at the bar, were the leaders of the profession. But when, in the seventeenth and eighteenth centuries, the serjeants declined from their high estate,[5] their Inns became in effect legal clubs. The work of organizing and disciplining the bar was done by the Inns of Court, assisted by the judges, acting, not as members of the Serjeants' Inns, but as a tribunal to which members of the Inns, who were dissatisfied with the rulings of the Benchers, could appeal.[6]

The Inns of Court and Chancery.

The Inns of Court.

At the beginning of the eighteenth century, the Inns of Court had ceased to hold the position in the national life which they had held from the days of Fortescue to the middle of the seventeenth century.[7] They were ceasing to be a university,[8] to which many young men, who never intended to make their living by the law, came, in order to get the benefit of the social, as well as the intellectual education and training, which their common life and activities and system of teaching gave to their inmates. Addison's Inner Templar, man of letters and dramatic writer, had "chosen his place of residence rather to obey the direction of an old humoursome father than in pursuit of his own inclinations"; [9] and the jargon talked by the lawyers was the subject of ridicule by the wits.[10] The chief reason for this

[1] The portraits were presented to the National Portrait Gallery, Pulling, op. cit. 126 n. 2.

[2] Gray's Inn Pension Book ii *xxiii*, 162, 173, 178.

[3] Ibid ii 197-198, 200, 201, 202, 203.

[4] Above 6.

[5] Vol. vi 477-478.

[6] Vol. ii 497 n. 5; below 28-33.

[7] Vol. ii 485, 494, 509-510; vol. iv 267; vol. vi 484-486.

[8] "The most famous Universitie for profession of law only, or of any one human Science that is in the world," 3 Co. Rep. Pref., cited vol. ii 494 n. 2.

[9] The Spectator no. 2.

[10] Ibid no. 551—"The next informed the Court that his client was *stripped* of his *possession*; another begged leave to acquaint his Lordship they had been

phenomenon was the disappearance, at the end of the seventeenth century, of the collegiate life and collegiate educational system of the Inns.[1] At the beginning of the eighteenth century the Inns had ceased to be educational institutions. Educationally they had become what a witness, who gave evidence before the Inns of Court Commission in 1854, called them—"a university in a state of decay." [2] Socially, it is true, they still maintained some of the remnants of their old collegiate life ; [3] and for this reason they were able to maintain amongst their members a healthy standard of professional conduct. But they had ceased to be in any sense the legal university which they once were, and had become simply associations of lawyers, to whom was entrusted the selection of the members of the Bar and its organization and discipline. "Few gentlemen now resort to the Inns of Court," says Blackstone, "but such for whom the knowledge of practice is absolutely necessary." [4]

It is for this reason that the history of the Inns of Court in the eighteenth century is far more humdrum than it was in the sixteenth and seventeenth centuries. It is only very occasionally that we read of revels comparable to those which took place in the preceding centuries.[5] In 1726 there were revels at Lincoln's Inn at which the Prince and Princess of Wales were present ; [6] and there were also revels at the Inner Temple in the same year.[7] At the Inner Temple in 1734 there were revels on the old scale to celebrate the accession of Talbot to the Chancellorship—a great dinner, two plays, the solemn dance round the coal fire,[8] a ball, and a supper. The Prince of Wales was present incognito.[9] But these were exceptional events. We hear no more of them in this century ; and royalty

saddled with costs. At last up got a grave Serjeant, and told us his client had been *hung up* a whole term by a *Writ of Error*. At this I could bear it no longer . . . : for surely tho' the Lawyers subscribe to hideous *French* and false *Latin*, yet they should let their Clients have a little decent and proper *English* for their money. What man that has a value for a Good Name would like to have it said in a publick Court, that Mr. Such-a-one was stripped, saddled, or hung up."

[1] Vol. vi 488-493.

[2] Parlt. Papers 1854-1855 xviii 135—evidence of Robert Lowe.

[3] Below 18-20, 27-28, 39-40. [4] Comm. i 26. [5] Vol. iv 267-268.

[6] Black Books of Lincoln's Inn iii 276, 277, 470—the feast was in honour of Sir Robert Walpole who was made a bencher.

[7] Ibid 470—in honour of Lord Chancellor King.

[8] Foss, Judges viii 92-93—"As soon as dinner was ended, Congreve's comedy o ' Love for Love ' was performed, followed by Coffey's farce of ' The Devil to Pay,' then recently produced : the actors coming ready dressed in chairs from the Haymarket, and refusing to receive any gratuity for their trouble. After the play the old ceremony of the solemn dance, or rather march, round about the coal fire three times was revived ; the master of the revels taking the Lord Chancellor by the hand, and he the eldest judge, and so through the whole company of judges, serjeants, and benchers : the procession being enlivened by the ancient French song, accompanied by music, sung by Toby Aston, in a bar gown."

[9] Ibid 93.

did not again visit any of the Inns till more than a century afterwards.[1] The readers' feasts, at which royalty had sometimes been present in preceding centuries,[2] ceased with the cessation of readings. The treasurer's feasts at Lincoln's Inn ceased after 1706.[3] The last serjeants' feast was at Lincoln's Inn in 1759.[4] It was no doubt an advantage that some of these entertainments came to an end. We have seen that the readers' feasts had been the occasion of much extravagance and disorder.[5] But the abandonment of the collegiate life and collegiate educational system of the Inns, which was to a large extent the cause of the cessation of the old revels, was a far greater disadvantage to the students of the law and to the law itself.[6]

The benchers of this century and later must be blamed for their almost complete abandonment of any attempt to give the students an effective legal education. On the other hand, they deserve praise for the manner in which they maintained the high standards of the bar by the measures which they took to organize and discipline it.[7] No doubt the Inns, like the universities and many parts of the machinery of government, suffered from a lack of that control and supervision which the central government had applied in the sixteenth and early part of the seventeenth centuries.[8] The Inns, like other institutions, suffered from an excessive amount of self-government which made it easy for abuses to grow up and to remain unreformed. But, for all that, the work of the Inns in the eighteenth century, like the work of other institutions of government central and local in that century, was so fundamentally sound that it was approved in essentials by the reformers of the nineteenth century; and, as modified by those reformers, it is apparent to-day, first, in the organization of the Inns and the discipline of their members; secondly, in the management of the Inns by their benchers and officers.[9] Let us glance briefly at the activities of the Inns in the eighteenth century under these two heads.

[1] The next royal personage to visit the Inns was Queen Victoria when she came in 1845 to open the new hall and library at Lincoln's Inn, Foss, Judges viii 93.

[2] Vol. vi 539.

[3] Black Books of Lincoln's Inn iii *xi*—"Spencer Cowper, who was Treasurer in that year, commuted his feast by the payment of six guineas, an example followed by seven of the Treasurers who followed him."

[4] Pulling, Order of the Coif 241 n. 3; Ingpen, Master Worsley's Book 303 n. 1; the feast in 1736 in the Middle Temple Hall, and the expense of the dinner, robes, rings, and the use of Serjeants' Inn cost the fourteen serjeants £185 a head, Foss, Judges viii 90; Pulling, Order of the Coif 240.

[5] Vol. vi 491-492. [6] Ibid 499; below 78-80. [7] Below 18-20, 22-28.

[8] See Calendar of Inner Temple Records iii *xcvi*.

[9] Mr. Fletcher says of Gray's Inn in the eighteenth century: "The Society settled down to the quiet life naturally most congenial to a body now chiefly composed of serious students and busy professional men. It may be said, too, that though

(1) *The organization of the Inns and the discipline of their members.*

It was during the eighteenth century that it was finally settled, first that the government of the Inns is vested in the benchers, and that the other members of the Inns have no share in it; and, secondly, that calls to the bench are in the absolute discretion of the benchers. The freedom of action, which the benchers of the Inns thus secured, led to the growth of the modern rules as to the precedence of benchers, as to persons qualified to become benchers, and as to the position of the treasurer and other officers of the Inns.

At the end of the seventeenth century, and occasionally during the eighteenth century, claims by the barristers and students to have some share in the government of the Inns were made. At Gray's Inn in 1720 a committee, consisting of two barristers and two students, was allowed to inspect the accounts of the Inn.[1] They reported that the accounts were "perplexed and confused," and made some very drastic criticisms upon the extravagant manner in which the officers and servants of the Society were paid.[2] This report produced some reforms.[3] But the appointment of this committee seems to have been an isolated instance; and when, in 1777, the barristers protested against a subscription for the relief of the troops at Boston, and denied the right of the benchers to apply the Society's money as they pleased, the benchers passed a resolution "founded on the clearest authorities recorded in their books that the government of this Society solely resided in the Bench."[4] At the Middle Temple in 1730 the barristers and students claimed to have the right to assemble in a Parliament in the vacation, and to propose reforms in the government of the Inn; and they denied that the benchers had any power to control this right.[5] The benchers ordered the ring-leaders

inferior in point of its total membership, and of its roll of distinguished alumni, as well as of its educational efficiency, and, indeed of general vitality, to the standard reached and maintained in recent years, it was in possession of most of the main features which it presents to-day," Pension Book ii *xxi*; this is true also of the other Inns.

[1] Pension Book of Gray's Inn ii 178-179.

[2] Ibid 181-182; the general conclusion of the committee was that "the great decay and ruinous condition of the Society as they conceive is in a great measure owing to the want of better collecting and applying the revenue."

[3] Ibid 182, 183-184. [4] Ibid 326.

[5] A. R. Ingpen, Master Worsley's Book 119-124, and 119 n. 2; for an account of an attempt to challenge the authority of the bench at the Middle Temple in 1694 see Williamson, History of the Temple 559 seqq.; there was an appeal to the judges, who upheld the contention of the benchers that "the Middle Temple ever since they were a Society have been governed by the orders made by the Masters of the Bench and for not observing their orders or for misdemeanours or for endeavouring to make meetings in the Society the offenders have been fined and expelled and their chambers seized to the use of the House as appeares by a multitude of presidents above one hundred years agoe and since."

to be fined and put out of commons till they submitted to their orders.[1] The ring-leaders, "instead of submitting themselves, congregating most of the young gentlemen then in commons, did come up all together the supper following to the Bench Table, and demanded a present repeal of the said order." [2] On the refusal of the bench to repeal the order, "they hasted down tumultuously, and calling for pots, they threw them at random towards the Bench Table, and therewith stroke divers Masters of the Bench." [3] The judges were called in who committed two of the ring-leaders to prison, and bound two others over to be of good behaviour. The bench wished to expel them and other delinquents; but, on the persuasion of the judges, they pardoned them upon receiving a written apology. But they took the occasion to

> order it to be expulsion ipso facto for any man at any time hereafter to take upon him, to exercise, or claim, any power, liberty, or authority, to govern within the House, otherwise than as subordinate and subject to the orders controul and government of the Masters of the Bench.[4]

At Lincoln's Inn in 1688 the Bench consented to allow their accounts to be inspected by a committee of barristers and students; [5] and in 1719 the Inner Temple allowed four persons appointed by the bar and the students to inspect the books containing the statutes and orders of the Society.[6] But these were exceptional concessions. In 1691 a claim by the barristers and students of Lincoln's Inn to have some share in the election of the preacher was rejected; [7] and in 1725 the benchers asserted that

> the right of making orders and giving direccion concerning all the publick buildings, gardens, and walkes belonging to the Society, is in the Masters of the Bench, as incident to the government of the House.[8]

The only modification of the principle thus asserted in this century, that the sole government of the House is in the Benchers, was the rule at Lincoln's Inn which gave the barristers of the Inn a limited control over calls to the bar. Subject to an appeal to the bench, they could refuse to allow a student to perform his exercises, and so prevent his call, if he had acted as paid clerk to a barrister, conveyancer, special pleader, or equity draftsman, if he was in trade, or if he had written for hire in the newspapers.[9] But this last disqualification, which had been added in 1807, was abolished by the bench in 1810.[10]

[1] Ingpen, op. cit. 122. [2] Ibid 123. [3] Ibid.
[4] Ibid 124. [5] Black Books of Lincoln's Inn iii 163.
[6] Calendar of Inner Temple Records iv 52.
[7] Black Books of Lincoln's Inn iii 178.
[8] Ibid 273. [9] Ibid iv *iv*, 110-111.
[10] Ibid 111; for instances of appeals to the benchers which were allowed see ibid iv *iv-v*.

This control by the bar over calls was disapproved by the Commissioners appointed to enquire into the practice and procedure of the courts of common law;[1] but it survived till 1856. In that year exercises at the bar table were abolished by the benchers with the consent of the bar.[2]

We have seen that, at the end of the seventeenth century, Francis North had successfully asserted the right of King's counsel to be called to the bench; but that after the Revolution the Inns had recovered their freedom of choice.[3] At the Middle Temple Master Worsley, writing in 1734, says that the attorney and solicitor-general claimed the right to be elected; but that the right of King's counsel to be elected had been disputed.[4] As a matter of fact the Middle Temple, following a precedent set by Gray's Inn in 1689, had refused in 1718 to elect two King's counsel.[5] In 1796 the four Inns resolved that masters in Chancery had no right to be called to the bench, and that it was not expedient to call them.[6] In earlier days it had been the custom to call to the bench such dignified officials of the courts as the prothonotaries and the masters in Chancery.[7] Sometimes, however, they were made only associates of the bench[8]—a class of benchers intermediate between the barristers and full benchers,[9] who normally became in course of time full benchers.[10] This class of benchers gradually drops out in the course of the century;[11] but in some respects they correspond with the

[1] "The candidate is made liable to the danger of rejection by either of two bodies exercising a veto in succession; a strictness for which we see no sufficient reason, and which is not practised by any other of the Law Societies," Parlt. Papers 1834 xxvi 10.

[2] Black Books of Lincoln's Inn iv *v*.

[3] Vol. vi 479-480; Williamson, History of the Temple 564-565, 566-567; Pension Book of Gray's Inn ii 106-107.

[4] Ingpen, Master Worsley's Book 110; Middle Temple Bench Book 35.

[5] Ibid 35, 238.

[6] Pension Book of Gray's Inn ii 376.

[7] Vol. vi 479; in 1736 Lincoln's Inn called a master in Chancery to the bench, Black Books iii 311; in 1717 Sir George Cooke, prothonotary of the court of Common Pleas was called to the bench at the request of the judges of that court, Calendar of Inner Temple Records iv 30-31.

[8] Ibid iii 380; for a statement as to the practice at the Inner Temple see ibid iv 273-274; Black Books of Lincoln's Inn iii 357.

[9] Brerewood, writing in 1634, says: "The Associate is not tied in all things to such regularity as the Benchers are; for they come into the Hall in their hat, whereas the Benchers come in round caps, according to the ancient use. Besides the Associate is not tied to keep the Case after dinner nor to sit at mootes; yet there have been Associates so tied; viz. those who, being past their readings and yet afterwards, by reason of their gravity and learning, received to the Bench Table; touching whom there was an order in Parliament made an. 11 Eliz. that they were to be accounted Benchers, saving that they were not to have any voice or place in Parliament nor in ordinary matters of the House," cited Ingpen, Middle Temple Bench Book 29-30; associates date from the latter part of the sixteenth century, Williamson, History of the Temple 191.

[10] In 1694 a person made an associate was ordered to enter into a bond to come to the bench when called, Black Books of Lincoln's Inn iii 190.

[11] The last election at the Middle Temple was in 1730, Middle Temple Bench Book 35; at Gray's Inn in 1720, Pension Book ii 177; and at Lincoln's Inn the last election recorded in the printed Black Books was in 1769, vol. iii 399.

honorary benchers of the present day.[1] Lincoln's Inn resolved in 1765 that a barrister was not qualified to be a bencher unless he had been a member of the Inn for seven years after his call; but that this was not to apply to the attorney or solicitor-general.[2] The Middle Temple in 1777, and Lincoln's Inn in 1794, ordered that no bencher of any other Society should be called to the bench;[3] and that if a bencher of these societies accepted a call to the bench of another society he should be incapable of being elected treasurer.[4]

It was during the eighteenth century that the position of the treasurer as head of the Inn was finally settled; and that the modern rule, that he is elected in rotation, and holds office for a year, was ascertained. At Gray's Inn these rules were fixed in the second half of the century.[5] At Lincoln's Inn, in the sixteenth and seventeenth centuries, the Lent reader was the head of the Society; but when, at the end of the seventeenth century, readings ceased, the process began by which the treasurer gradually became the head of the Inn.[6] It was a long process. The last reader put up his arms in chapel in 1677; it was not till twenty-five years had elapsed that the bench authorized the treasurer to put up his arms;[7] and it was not till 1770 that his position was finally ascertained.[8] The order in which the various offices in the Inn—treasurer, master of the library, dean of the chapel, keeper of the black book, and master of the walks—are served, was not settled till the nineteenth century.[9] It was gradually settled in the course of the eighteenth century that the treasurer should be elected in the order of the seniority of his call to the bench, subject to right of the attorney-general to be elected out of his turn.[10]

[1] The first election of an honorary bencher at the Middle Temple was in 1761 when Sir John Cust, the Speaker, was elected; he chose to be considered only as an honorary member, not liable to be elected reader or treasurer, but to pay all duties then due and growing due, Middle Temple Bench Book 35.

[2] Black Books iii 383. [3] Ibid iv 61. [4] Ibid.

[5] Pension Book of Gray's Inn ii *xxiv*; in 1744 it is "resolved the office of Treasurer to go by rotation according to seniority and no Treasurer to continue longer than one year," ibid ii 245.

[6] Black Books of Lincoln's Inn iii *ix*. [7] Ibid *x*.

[8] "Between 1748 and 1762 the Master of the Library is frequently elected before the Treasurer on the election of officers. He did not attain his present position till 1770, when it was ordered that for the future the Treasurer for the time being should take place of all other Masters of the Bench in the Hall at Dinner, at the Council and in Chapel," ibid.

[9] In the eighteenth century "the Black Book of one year becomes Treasurer of the next year, and in the two succeeding years Dean of Chapel and Master or Keeper of the Library," ibid iii *ix*.

[10] In 1737 Lincoln's Inn ordered that King's counsel were to have no preference, but the order was rescinded in 1754, Black Books iii 314, 356; seven years later the former order was revived, ibid 372; but the attorney and solicitor-general still had a preference till 1772, when it was ordered that the attorney-general alone should have a preference, ibid 411.

Earlier in the century the solicitor-general and King's counsel were sometimes elected out of their turns.[1] But, according to an order of 1736, no bencher could be elected treasurer till he had been a bencher for four terms.[2] In 1759 Gray's Inn resolved that precedence in Hall and at Pensions should be decided by the date of call to the bench, except in the case of the treasurer for the time being;[3] and in 1789 that "King's Council, as such, have never had any preference in the election to the office of treasurer."[4] At the Middle Temple, at the beginning of the seventeenth century, the treasurer had no voice in Parliament till he had read, and till 1621 he was not always appointed annually. It was not till 1735 that it was resolved "that for the future every Master of the Bench shall be chosen Reader and admitted to the office of Treasurer of the Society according to his seniority from his call to the Bench and not otherwise."[5]

The most important of the duties of the benchers was their duty to call to the bar those students whom they considered to be qualified, to admit students to the Inn, and to maintain discipline and standards of professional conduct amongst the barristers and students.

The call to the bar is, subject to an appeal to the judges if a call is refused, in the absolute discretion of the benchers.[6] We have seen that, down to the end of the seventeenth century, the benchers refused to call any student who had not kept his terms, and gone through the severe course of legal education which was prescribed by the regulations of the Inns.[7] When the educational system of the Inns collapsed, when the performance of exercises, the requirement of residence, and the keeping of terms by the students, had become mere forms,[8] it was natural that calls to the bar should sometimes be made by favour of the bench, and that the formal requirements of exercises and the keeping of residence and terms should, in such cases, be dispensed with. At the Middle Temple, at the beginning of the century, the sons of benchers were excused from keeping commons, keeping vacations, and performing exercises —in effect they escaped all the obligations imposed upon the ordinary students.[9] At Gray's Inn there are several instances when some or all of the obligations imposed on the ordinary student were dispensed with. Thus in 1701 it was "ordered that Mr. Gilfred Lawson, late knight of the shire for the county of Westmoreland, be called to the Bar by the favour of the

[1] Black Books of Lincoln's Inn iii *ix.*
[2] Ibid 310.
[3] Pension Book ii 289.
[4] Ibid 348.
[5] Ingpen, Middle Temple Bench Book 89 n. 1.
[6] Vol. ii 497; below 28-29.
[7] Vol. ii 506-508; vol. iv 263-264; vol. vi 481-489.
[8] Ibid 488-489.
[9] Ingpen, Master Worsley's Book 126 n. 1.

Bench." [1] But in 1723 the benchers of Gray's Inn were beginning to be conscious of the irregularity of these proceedings, and so, without wholly condemning them, they resolved that, if permitted, the grant of their permission should be profitable to the Inn. It was ordered in that year

> that for ye future no gentleman of this Society shall be called to the Bar *ex gratia* and without being full standing but upon payment of £20 besides all other dues and dutyes whatsoever which said £20 is to be laid out in bookes for the Library.[1]

For some time longer these *ex gratia* calls were made. Thus in 1740 the Middle Temple called Henry Fielding, after keeping only three years' terms, partly because he was of twelve years' standing in the University of Leyden, and partly because he was "a near relation to Mr. Gould, one of the Masters of the Bench, who from his own knowledge assured their Masterships of the said Mr. Fielding's great application and progress in the study of the law." [3] For some time longer, also, similar calls were made on the recommendation of the judges. In 1727 a student was called "by grace in obedience to a letter from the Lord Chief Justice Raymond"; [4] in 1727 and 1728 similar calls were made on the recommendation of Comyns, B. and Hale, B.; [5] and in 1734 on the recommendation of Reynolds, C.B.[6] It was not till 1759 that this practice was abolished, and it was "ordered that no gentleman shall be called to the Bar upon any recommendatory letter whatsoever." [7]

By that time the Inns were beginning to agree to pursue a common policy as to calls to the bar; and, as the result of the consequent standardization of the conditions of call, these irregular practices were ceasing. In 1730 conferences were held between the Inner Temple and Gray's Inn,[8] and between Lincoln's Inn and the Middle Temple,[9] for the discussion of a common policy as to the conditions of call; and in 1762 a common set of conditions was agreed upon. These conditions were as follows: [10]

> That for the future no person shall be called to the Bar in this Society before the end of five years from ye time of his admission, nor shall any person be called to the Bar who shall be under the age of 21 years.

[1] Pension Book ii 136; in 1714 a M.A. of Cambridge, who was "of more than Dr. of Civil Law standing," was called, though not of full standing "by the grace and favour of the Bench," ibid 160-161; see ibid 204 for another instance.

[2] Ibid 188.

[3] B. M. Jones, Henry Fielding 70-71, citing Minutes of the Middle Temple Parliament June 20, 1740.

[4] Pension Book of Gray's Inn ii 204.

[5] Ibid 204, 206.

[6] Ibid 223.

[7] Ibid 289.

[8] Ibid *xxiii*.

[9] Black Books of Lincoln's Inn iii 295.

[10] Pension Book of Gray's Inn ii 297-298; Black Books of Lincoln's Inn iii 374-375.

That every person shall actually keep commons in ye Hall twelve terms before he be called to the Bar. That Masters of Arts and Batchelors of Law of the Universities of Oxford and Cambridge may be called to the Bar at the end of three years from the time of their admission but this not to dispence with keeping their usual commons.[1] That no person be called to the Bar before the time prescribed on account or pretence of his practising the law in Ireland or the Plantations. That no attorney, sollicitor, clerk in Chancery, or of the Exchequer shall be called to the Bar until the end of two years at least after they shall have discontinued practising as such.

In 1789 Lincoln's Inn adopted the practice of the Inner and Middle Temple, and ordered that no one should be called till the next council after that in which his call had been moved by a master of the bench, and that in all cases a master of the bench must move his call.[2] Subject to these rules, each Inn had power to make what other rules they pleased as to conditions of call.[3] This power was recognized in the further conditions which the four Inns laid down in 1798.[4] These conditions laid it down that a student, in order to keep his terms, must have been present at dinner in hall at least three times in each term before Grace was said; that he must not leave the hall till after Grace was said;[5] and that the name and description of all candidates for call must be hung up in hall a fortnight before the call took place.[6] In 1779 Lincoln's Inn, in reply to a question from Gray's Inn, resolved that "a member of an Inn of Court, having taken the benefit of an Insolvent Debtors Act, is not a proper person to be called to the Bar."[7] In the same year it was resolved by Lincoln's Inn and the Inner Temple that a person in priest's orders,[8] and in 1794 by all the Inns, that a person in deacon's orders,[9] was not qualified to be called to the bar. In 1793 the Inner Temple and Gray's Inn agreed that a proctor, practising as such, was within the spirit, though not the letter of the rule of 1762 disqualifying attornies and solicitors.[10] In 1794 it was decided by all the Inns that "the privilege allowed to Masters of Arts and Bachelors did not extend to *mandamus* or honorary degrees."[11]

But the Inns, then as now, still retained a dispensing power; and appeals, then as now, were made to them to exercise it.

[1] Wynne, Eumomus ii 20-21, writing 1774, says that the University had been "made the almost constant step to the bar," as the result of this concession.
[2] Black Books of Lincoln's Inn iv 45.
[3] See Pension Book of Gray's Inn ii *xxiv*.
[4] "That every Society be at liberty to continue or make such rules respecting the keeping terms as now prevail or as they shall hereafter see fit," Black Books of Lincoln's Inn iv 73.
[5] Ibid 73. [6] Ibid 74. [7] Ibid 15.
[8] Ibid 14-15. [9] Ibid 59.
[10] Pension Book of Gray's Inn ii 367, 373.
[11] Ibid 373, 374; Black Books of Lincoln's Inn iv 61.

In 1785 Edward Morse, a student of Gray's Inn, appealed for a dispensation of the requirement of keeping his full number of terms. He had been admitted a student in 1759 and kept six terms. From 1772 to 1778 he had acted as chief justice of Senegambia. He had not practised as an attorney since he had held that appointment "except in three or four cases wherein he was personally concerned and not in any other instance within the two years last past." He was obliged to go to Jamaica on a matter of law; and, under these circumstances, he asked that his remaining terms might be dispensed with. His petition was refused on the ground that it was contrary to the rules agreed upon by all the Inns in 1762.[1] Sometimes one Inn, to which a petition of this kind was addressed, would consult the other Inns. Thus in 1790 Gray's Inn consulted the other Inns on a similar petition presented by Sir Ashton Byam, the attorney-general of Grenada; and, notwithstanding the opinion of Lincoln's Inn, granted him a dispensation of five terms.[2] It is clear that, though the Inns still possessed a dispensing power which they have never lost, the conditions under which they would exercise it, like the conditions of call to the bar, were being standardized and reduced to order and form. It is clear that by the end of the century most of the fundamental conditions for a call to the bar, which are recognized to-day, have been reached.

Similarly, the ceremonial of the call was becoming stereotyped. At Lincoln's Inn the ceremonial in the eighteenth century was as follows: [3]

> Calls were made in only two terms of the year, Easter and Michaelmas terms: the call took place in open Council in term time; three or more Masters of the Bench meeting in the Council Chamber or Buttery were made a sufficient Council for calling any gentleman: the quorum was summoned by the Quatuor [4] in Hall on the application of any gentleman desiring to be called to the Bar. The Masters were attended by the Chief Butler with the Books of Admission, and by the second Butler with the Book of Exercises. Each Master was entitled to a service of sweetmeats value 5/- and a bottle of wine from each gentleman.[5]

The custom that a student, on being called, should "treat the Hall" was abolished in 1741, and instead, "every person called to the Bar paid £5 to the use of the Library in lieu of the 13s. 4d. formerly paid." [6]

[1] Pension Book of Gray's Inn ii 346-347. [2] Ibid 362-364.
[3] Black Books of Lincoln's Inn iii *iv*.
[4] The Quatuor were the four senior benchers dining in hall, ibid *v*.
[5] Bagehot says, Literary Studies (Silver Library ed.) iii 254, "at our call to the bar we kept a last exercise . . . and we presented comfits to the Benchers' wives."
[6] Black Books of Lincoln's Inn iii 324.

By the end of the century the rules as to the admission of students were also attaining their modern form. At Lincoln's Inn, subject to the special privileges allowed to readers and benchers, the student must enter into a bond to pay all dues ; [1] and this was also the rule at Gray's Inn.[2] In 1798 the four Inns, in addition to the bonds, required a deposit of £100, except in the case of members of the college of advocates in Scotland, or members of the universities of Oxford, Cambridge, or Dublin who had kept two years' terms.[3] Throughout the century there are instances of students admitted *ad eundum* from another Inn. When admitted they were given the same position as they held in their original Inn.[4] In 1791 an absent-minded student, who had been admitted at the Middle Temple, and had by mistake eaten his dinners at Lincoln's Inn, wished to have this rule applied to his case. Lincoln's Inn certified the facts ; [5] but whether or not the Middle Temple acceded to his request does not appear. During the latter half of the eighteenth century the four Inns had been tending in the direction of a common policy with respect to admissions ; [6] and in 1828 these conditions were codified as follows : [7] applicants for admission must produce a testimonial signed by one bencher or two barristers certifying that the applicant was a fit person to be a member of the Inn, and to be called to the bar. No attorney or solicitor or person articled to any attorney or solicitor was to be admitted. The applicant must sign a declaration that he was desirous of being called to the bar, and that he would not, without the special permission of the benchers, take out or apply for any certificate to practise as a conveyancer under the statute of 1804.[8]

The reason for this last-named requirement was the existence of a serious defect in this statute. The intention of the statute was to confine conveyancing to the legal profession—thus

[1] Black Books of Lincoln's Inn iii 393 (1768).
[2] Pension Book ii 9 (1670), 350 (1787).
[3] Ibid ii 382-383 ; Black Books of Lincoln's Inn iv 73-74.
[4] Ibid iii *i*, 187.
[5] " Upon petition of John Hamilton, gentleman, stating that he has kept seven terms commons in the dining Hall of this Inn, that upon applying at the Steward's Office for a certificate was inform'd that he had not been admitted a member of this House, and, on searching the books of the other Law Societies, found that he had been entered of the Middle Temple by mistake, and praying the Society will under these circumstances grant him a certificate of his keeping his said terms.—It is order'd . . . that the Treasurer do certify the number of terms he has kept in this Society according to the truth of the case," ibid iv 50.
[6] See Calendar of Inner Temple Records iv 271-272.
[7] Black Books of Lincoln's Inn iv 174-175.
[8] 44 George III c. 98 § 14 ; the regulations in force in 1834 as to admissions and calls to the bar in each of the four Inns are set out in Parlt. Papers 1834 xxvi 42-46, and are summarized at p. 4 ; in substance they were the same as those settled during the eighteenth century.

closing a controversy with the scriveners which had, as we shall see, become acute in the middle of the eighteenth century.[1] But the statute had allowed any member of an Inn of Court to get a certificate both as a conveyancer and as a special pleader.[2] The result was, according to a petition by Mr. Anderton to the House of Commons, that "linen-drapers, shopkeepers, auctioneers, and inferior tradesmen, without any legal education whatever, have been enabled to get themselves admitted as members of an Inn of Court, and are now actually practising as certificated conveyancers."[3] This complaint was endorsed by the committee of the Law Society;[4] and the Inns recognized its truth by inserting, in 1828, into the conditions for the admission of students, this condition as to not taking out a certificate to practise as a conveyancer or pleader without the permission of the benchers of their Inn; and also by binding themselves not to give this permission till the student was qualified for call, and to give their permission only for a year.[5] It is clear that in the rules as to the admission of students, as in the rules as to call, many of the modern conditions have, in substance, been reached.

The fact that the Inns of Court had, at the end of the seventeenth century, ceased to be colleges which educated resident students, made the problem of discipline much less acute than it had been in the latter half of the seventeenth century.[6] We rarely hear of organized resistance to the authority of the benchers;[7] and the benchers maintained their control over their members, both barristers and students. In 1778 Gray's Inn prohibited "the discharging of firearms in the courts and gardens of this Society";[8] and though licensed bonfires were held in Gray's Inn in George I's reign to celebrate the landing of William III on November 4, and the discovery of

[1] Below 70-72.

[2] Among the persons entitled to get certificates were "members of one of the four Inns of Court."

[3] Black Books of Lincoln's Inn iv 144 n. 1, citing Journal of the House of Commons, vol. 72 p. 89.

[4] Ibid 144.

[5] Ibid 175; the commissioners on the practice and procedure of the courts of common law criticized these rules on the ground that they made "all persons, however well qualified, hold their profession of Special Pleader or Conveyancer by the precarious tenure of the pleasure of the Benchers. . . . To subject Special Pleaders in particular, to a regulation so arbitrary, is to expose to inconvenience and disadvantage a body of persons whose prosperity is of great importance to the general interests of the profession, and to the science of the law itself"; the fact that Stephen, the most eminent pleader of his day, vol. ix 312, 324, was one of the commissioners, perhaps explains this magnification of the law of pleading.

[6] For the riots which occurred in the latter half of the seventeenth century see vol. vi 492-493.

[7] For disorders in the Middle Temple in 1694 see Williamson, History of the Temple 560 seqq.; for the disorders in the Middle Temple in 1730 see above 18-19.

[8] Pension Book ii 329.

the gunpowder plot on November 5,[1] in 1759 the benchers prohibited bonfires at Holborn Gate.[2] In 1717 the benchers of Lincoln's Inn, having noticed "that severall gentlemen of the Society appeare in the Hall either without gowns or with only peices of gowns," it was ordered that every one must appear in hall "in a decent gown";[3] and a similar order was made in 1732.[4] There are several instances of the expulsion of members, or of putting members out of commons, for unseemly conduct.[5] But sometimes the sentence of expulsion was remitted upon the member making an apology. Thus in 1700 there are the following entries in the Black Books of Lincoln's Inn:[6] at a Council held on April 23, 1700,

John Hungerford, Esq., a barrister, is hereby expelled the Society for twice breaking a padlock off his door; and also for saying of Eldred Lancelott Lee Esq., one of the Benchers, who attended to see to the padlocking, "Mr. Lee is a Rascall, and I will break his head if I can meet him abroad." His chamber shall be seized and sold; he has seven days allowed him to remove his goods.

At a Council held on May 3,[7]

Mr. John Hungerford appeared at this Council and expressed his sorrow for his disobedience and contempt, and apologized to Mr. Lee; he has paid all his arrears. All former Orders relating to the seizure of his chamber or his expulsion from the Society are accordingly vacated.

In 1719 Robert Darwin, Esq., a barrister, brought a dog into hall in defiance of the benchers' order. When the porter tried to turn the dog out "the said Mr. Darwin did offer to fling a pot at the porter's head, and threatened to knock him downe; whereby the said porter was intimidated and unable to execute the said order."[8] The bench exacted an apology from Mr. Darwin, and a promise to offend no more.

The control by the governing bodies of the Inns over their members was subject to the visitatorial power of the judges. We shall see that a member of an Inn has no right to appeal to the courts against an order of the benchers of his Inn which affects his rights; but he has the right to appeal to the judges as visitors. Thus a student or a barrister can appeal against an order of expulsion; and a student can appeal against a refusal to call to the bar.[9] The nature of, and the limitations upon, this right of appeal were settled by the decisions of the courts during the seventeenth, eighteenth and nineteenth centuries.

[1] Pension Book ii *xxv*. [2] Ibid 290. [3] Black Books iii 249.
[4] "Ordered that no gentleman of this Society do come into the Hall but in their proper gowns nor come in nor go out with their hatts on," ibid 301.
[5] Ibid 286; iv 179; Pension Book of Gray's Inn ii 138-139, 151, 290.
[6] Black Books iii 204. [7] Ibid. [8] Ibid 257. [9] Vol. ii 497.

It was held in 1642 that the courts had no jurisdiction to entertain an appeal by a member of an Inn, against an order made by the benchers of his Inn, expelling him from the Inn.[1] The plaintiff had asked that a writ of restitution should be directed to the benchers. But the court refused to issue any such writ, first because the Inn was not a body corporate, "but only a voluntary society, and submission (*sc.*) to government," [2] so that there was no one to whom the writ could be directed; and, secondly, because he should have followed "the ancient and usual way of redress for any grievance in the Inns of Court which was by appealing to the judges." This case was followed by one or two others in the eighteenth century; [3] and in 1780 the law was finally settled in this way by Lord Mansfield in the case of *The King v. the Benchers of Gray's Inn.*[4] The court refused to issue a mandamus to the benchers at the suit of one Hart, a student of the Society, to compel them to call him to the bar. Lord Mansfield did not approve of the first of the grounds upon which *Booreman's Case* was decided. The fact that the Inns were not corporate bodies was no objection; [5] but he held that the second of the reasons there given was sound—"The true ground is that they are voluntary societies submitting to government,[6] and the ancient and usual way of redress is by appeal to the judges."

This principle, that the courts have no jurisdiction to decide matters in dispute between the benchers and any of their members, was applied to questions, not only of the personal status of a member, such as the right to a call or the right to continue to be a member, but also to questions arising out of the rights of members of the Inn to chambers in the Inn. Thus in 1728 the Master of the Rolls would have refused to entertain a bill to redeem a mortgage of chambers in Gray's Inn, if the benchers

[1] Booreman's Case, March N.R. 177.

[2] For the interpretation put on these words by the later cases see below 30-31 nn. 4 and 6.

[3] See the cases collected in The King v. the Benchers of Gray's Inn (1780) 1 Dougl. 353; for Savage's Case there cited see Black Books of Lincoln's Inn iii 4—Savage was a member of the Middle Temple. He had kept his terms, but no bencher would move his call. He then got a certificate of having kept his terms, went with it to Lincoln's Inn, and, without disclosing the reason why he was not called by the Middle Temple, got Lincoln's Inn to call him. Lincoln's Inn "ordered that all fees and expenses paid by him be returned and the order for his call expunged, as irregular and obtained by surprize": he appealed to the judges, and his appeal was dismissed.

[4] 1 Dougl. 353.

[5] "I do not take the first reason stated in March to be the true one. It is not solid. The second is the true reason. As to the first, the Inns of Court had regulations, they acted and were known as a body, and all the orders I have mentioned were directed to them," ibid at p. 355.

[6] This is, as Littledale J. explained in The King v. the Benchers of Lincoln's Inn (1825) 4 B. and C. at pp. 860-866, below 30-31, that they submit to the government of the judges acting as visitors.

had not recommended the parties to apply to the court ; [1] and in 1787 the court refused to entertain a bill against Gray's Inn to compel them to renew a lease of chambers.[2] "There is no instance," said Lord Thurlow, "of a suit either relative to the discipline or the property of chambers, in an Inn of Court." [3] Similarly, it was held in 1874 that a difference between Lincoln's Inn and a barrister of that Society, as to the terms upon which he was at liberty to retire from the Society, was a matter upon which he had a right to appeal to the judges ; but that no court had jurisdiction to determine it.[4] On the other hand, if a member of the Inn has made a contract with the Inn, an obligation is created, which, because it is additional to and apart from his obligations as a member of the Society, can be enforced by the courts. It follows that the Society can, for instance, enforce the bonds given by students on their admission for the payment of their dues.

It was decided, at the beginning of the nineteenth century, that it is only members of one of the Inns who have this right of appeal to the judges against the decisions of the benchers of his Inn. A person who is not yet a member cannot appeal either to the courts or to the judges against a refusal of the benchers to admit him to membership.[5] Littledale, J., stated the reason for this difference between the rights of members and non-members very clearly. He said : [6]

> When these are said to be voluntary societies submitting to government, that must be understood to import that they submit to a government to be exercised on the members of the Society. In all the cases which have come before the judges, the persons applying have been themselves members of the society. The judges, who are visitors, interfere on the principle of exercising an authority over the members of the society, as to their being called to the bar. This is not a case where the judges could be called upon to interfere to make the benchers submit to government as to one of the members. But here, the Court is called upon to control the society in the admission of their members. Now, so far as the admission of members is concerned, these are

[1] Rakestraw v. Brewer (1728) 2 P. Wms. at p. 512.

[2] Cunningham v. Webb (1787) 2 Bro. C.C. 241. [3] At p. 242.

[4] Neate v. Denman (1874) L.R. 18 Eq. 127 ; Hall V.C. said at p. 136, "he voluntarily became a member of it [the Society], and gave it a bond to pay certain dues during the whole of the time that he should be, and until he ceased to be, a member of it. The condition of the bond contains no stipulations as to the mode and circumstances by or under which he should cease to be a member of the Society. That was left to the internal regulations of the Society, of which he had become, and still is, a member. Therefore, in that state of things, the right to retire from the Society which the plaintiff claims is entirely a question between him and the Society. . . . That is a question entirely for the peculiar jurisdiction . . . which has always been recognised—namely, that of the judges of the Superior Courts of England" ; the judges still have this jurisdiction by virtue of 36, 37 Victoria c. 66 § 12, replaced by 15, 16 George V c. 49 § 18 (3).

[5] The King v. the Benchers of Lincoln's Inn (1825) 4 B. and C. 855.

[6] At pp. 860-861.

voluntary societies, not submitting to any government. They may in their discretion admit or not as they please, and this Court has no power to compel them to admit any individual. The masters and fellows of a college cannot be compelled to admit a particular individual a member. Neither can a corporation be compelled to admit a particular individual a freeman, unless he has acquired an inchoate right to become a freeman. The interference of the judges in the instance of those members whom the benchers have refused to call to the bar is perfectly right; because a member who has been suffered to incur expence, with a view to being called to the bar, thereby acquires an inchoate right to be called.

A little later it was held that the same principle applied to the governing bodies of the Inns of Chancery.[1] In spite of the argument that since the judges' orders of the late seventeenth and early eighteenth centuries compelled all attornies to be admitted to an Inn of Chancery, an attorney had an inchoate right to be admitted, the court of King's Bench held that the Inns of Chancery, like the Inns of Court, could not be compelled to admit a member.

The absolute power which the Inns of Court had of determining whether a person was qualified to be called to the bar; the efficacy of the remedy of an appeal to the judges which was open to an aggrieved member of an Inn; and the absence of all remedy for a person refused admission to an Inn—did not escape criticism in the era of reform which began in the second quarter of the nineteenth century. To the commissioners who were appointed to enquire into the practice and proceedings of the courts of common law the rules in force did not appear to be satisfactory.[2] They recommended that a person who was refused admission by the benchers of any Inn of Court should have a right to appeal to the judges;[3] that if the application of a person for admission to an Inn of Court, or if the application of a student for call to the bar, was rejected, notice in writing of the causes for rejection should be given, and that the person

[1] The King v. Barnard's Inn (1836) 5 Ad. and E. 17; for the Inns of Chancery see vol. ii 498-499; below 40-46.

[2] Sixth Report of Commissioners on Courts of Common Law, Parlt. Papers 1834 xxvi 8.

[3] Ibid 8-9; alluding to the case of The King v. the Benchers of Lincoln's Inn, above 29, they say: "Without presuming to question the correctness of this decision in point of law, we may be permitted to remark that in point of expediency, the ordinary immunities of a voluntary society ought not to be allowed to any body of persons claiming to be the medium of admission into one of the learned professions. If the body is to enjoy this privilege, it is no longer a private association, but one in which the public has a deep interest, and the proceedings of which, if not adapted to the purposes of general utility, ought to be made so by the interposition of law"; they therefore recommended that either by Act of Parliament or Order in Council a right of appeal to the judges should be given; it should be observed that the reasoning of the commissioners would apply to the Universities and their colleges—in fact it is difficult to see why the benchers of the four Inns are less fitted to decide this question of admission than the fellows of a college.

rejected should be "at liberty to make his defence either in person or by counsel and to produce evidence"; [1] and that in all cases "a full report of the proceedings before the benchers should be laid before the judges." [2] They further recommended that the rules made by the Inns as to the admission of students or as to call to the bar should not be valid till approved by the judges.[3]

It is not improbable that the case of Daniel Whittle Harvey,[4] whom the benchers of the Inner Temple had refused to call to the bar, and whose appeal had been rejected by the judges, had something to do with these recommendations. There is no doubt that, though appearances were at first sight against him, injustice was done. But "hard cases make bad law"; and it is probably fortunate that these recommendations were not acted upon in such a way that the powers of the Inns over their members, and over admissions to membership, were seriously diminished. The best judges of professional qualifications, intellectual or otherwise, are the leading men in the profession; and the benchers of the four Inns are a tribunal of that character. If, as the Commissioners thought, safeguards for a proper exercise of their discretion were desirable, that result has been obtained in a form which is preferable to that suggested by the Commissioners, because it has been obtained indirectly with the consent of the Inns, and in a manner which does not impair the free exercise of the discretion of an eminently competent tribunal. In 1837 the four Inns agreed that they would allow a person refused admission to appeal to the judges, and that they would be bound by their decision.[5] But it is clear that, unless an appeal is made, the absolute discretion of the Inns as laid down in the case of *The King v. the Benchers of Lincoln's*

[1] Sixth Report of Commissioners on Courts of Common Law, Parlt. Papers 1834 xxvi 9.

[2] Ibid. [3] Ibid.

[4] For this case see ibid, App. 1-41, 77-96; he appears to have been an able man, whose natural ability and pertinacity were sharpened by a sense of the injustice under which he had suffered; he secured in 1834 the appointment of a select committee to enquire into his case, which completely exonerated him from the charges made against him; and in 1855 he appeared before the commissioners appointed to enquire into the arrangements of the Inns of Court and Chancery for the study of the law, and again entered his protest against the extent of the powers possessed by the benchers of the Inns of Court, Parlt. Papers 1854-1855 xviii 140-144; it should be noted that the select committee reported that the miscarriage of justice, from which Harvey had suffered, was due to the fact that the reports of the two trials in which his conduct had been reflected upon, and upon which the benchers and judges acted, were imperfect, and also to the fact that neither the benchers nor the judges had power to compel the attendance of necessary witnesses or the production of necessary documents.

[5] Ingpen, Middle Temple Bench Book 18 n. 1; there was an appeal under this agreement in 1903, see L.Q.R. xx 8, where it is pointed out that in such cases the judges have no inherent right to intervene, as they have in the case of a barrister or a student.

Inn[1] remains. The introduction of a system of teaching and examination, the fact that the judges since the Judicature Acts are members of the benches of the four Inns, and the professional control of the bar exercised, at the beginning of the nineteenth century by the circuit messes, and at the end of the century by the bar council,[2] have supplied those safeguards for the exercise by the benchers of the Inns of Court of the powers entrusted to them, the absence of which inspired the recommendations of the Commissioners in 1834.

(2) *The management of the Inns by their benchers and officers.*

Though the settlement of the conditions of call and of the conditions of the admission of students, and the maintenance of discipline amongst their members, were the most important parts of the duties of the benchers of the Inns of Court, they could not have performed these duties adequately, unless they had taken pains to maintain and improve (i) the fabric of the Inns, (ii) the machinery of their government, and (iii) the activities of their societies and their members.

(i) The care of their existing buildings and gardens, and the erection of new buildings, was a matter upon which the benchers of all the Inns expended considerable pains. In 1685 Christopher Wren was called in by the benchers of Lincoln's Inn to advise as to repairs to the chapel,[3] and during the eighteenth century sums of money were from time to time spent on its adornment.[4] Gray's Inn took down and rebuilt a large part of its chapel in 1698-1699, and got rid of sets of chambers which had formerly been over it.[5] The Temple church, says Inderwick,[6]

> after its varied experience of altars, of tables, of vestments, of pulpits, of ornaments, and of whitewash, presented in the time of Anne a building not without attraction. Its former embellishments had gone, but . . . it was endowed with all the classical and architectural decoration which the greatest architect of the day could, without impropriety, add to the beauty of its original design.

But, he adds,

> The nineteenth century has swept away the handiwork of Wren, of Gibbons, and of other masters, and has reproduced as far as may be the medieval tone of the antient church.

The old Hall of Lincoln's Inn got the coat of stucco, which disfigured it till 1928, in 1801 ;[7] and it was lengthened by ten feet in 1819.[8] It was used for the sittings of the court of

[1] (1825) 4 B. and C. 855.
[2] See Halsbury's Laws of England (2nd ed.) ii 488-489.
[3] Black Books iii *xxi-xxii*. [4] Ibid.
[5] Pension Book ii *xiv-xv*.
[6] Calendar of Inner Temple Records iii *xcvii*.
[7] Black Books iv *xi*. [8] Ibid.

Chancery during the greater part of the eighteenth century,[1] and, indeed, right down to the opening of the Royal Courts of Justice in 1884. In 1739 the buttery had been fitted up as a room for the Lord Chancellor.[2] Gray's Inn repanelled its hall in 1706;[3] but, says Mr. Fletcher,

> At the death of Queen Anne it stood in new surroundings. Some few old piles of chambers remained to be replaced in the Georgian period. But it may be said that between 1669 and 1714, except for the Hall, parts of the Chapel, and a morsel here and there of various courts, Gray's Inn was rebuilt.[4]

There had been talk of rebuilding the Inner Temple Hall in 1632;[5] but the project did not materialize. It remained, much altered and repaired, till the present hall was built in 1868-1870.[6] In this respect the Middle Temple has, as Mr. Williamson has said, been more fortunate.

> Their ancient Hall still stands redolent of the historic past; and the Benchers, Barristers, and Students of the Inn . . . meet under the same roof beneath which Raleigh once sat, which echoed the joyous congratulations bestowed on Sir Francis Drake, and looked down on Shakespeare's company when Twelfth Night was acted . . . more than three centuries ago.[7]

All the Inns at this period paid considerable attention to their libraries. We have seen that, when bar treats were suppressed at Lincoln's Inn in 1741, the fee on call was raised to £5, and the money was devoted to the library.[8] Much was spent on books, and in 1744 the books, and in 1749 the manuscripts, were catalogued.[9] In 1725 the benchers of Gray's Inn were considering projects for the development of the library, which did not materialize;[10] but, in response to a request of the barristers and students, the library was ordered to be kept open for their use.[11] In 1707 William Petyt left his manuscripts

[1] Black Books iii *xxvii*; it was first used as a court by Jekyll M.R. in 1717 while Rolls House was being rebuilt; Talbot L.C. sat there in 1733, Hardwicke L.C. in 1736-1737, ibid; in the latter part of the century it was continually so used, and Bleak House opens with the court of Chancery sitting there.

[2] Ibid.

[3] Pension Book ii *xv*.

[4] Ibid.

[5] Williamson, History of the Temple 380.

[6] Ibid 669—" to Mr. Addison, writing in 1853, it appeared ' so altered and repaired as to have lost almost every trace and vestige of antiquity,' " ibid; Lamb, in his essay on the Old Benchers of the Inner Temple, which was written in 1821, says, " they have lately gothicized the entrance to the Inner Temple Hall, and the library front, to assimilate them, I suppose, to the body of the hall, which they do not at all resemble "; Mr. Justice Mackinnon, in his scholarly and beautiful edition of this essay, for which all lawyers and men of letters are grateful, tells us at p. 10 that these changes were made in 1819; for other details of the old hall see ibid 8-9.

[7] Ibid 669-670.

[8] Above 25; similarly, since 1827 each new bencher pays twenty guineas to the library fund instead of paying for a treat to his seniors at the bench, Black Books iv *ix*.

[9] Ibid iii *xxviii*.

[10] Pension Book ii *xxvi*.

[11] Ibid 199.

to the Inner Temple, and £150 towards the completion of its new library.[1] The library was completed in 1708-1709, a library keeper was appointed, and in 1713 it was ordered that £20 a year should be spent on books.[2]

By the end of the seventeenth century Serle's Court, now known as New Square, had been added to Lincoln's Inn;[3] and in 1774-1775 arrangements were made for the erection of Stone Buildings, and the buildings fronting on Chancery Lane which were used by the accountant-general, the deputy registers, and the six clerks of the court of Chancery.[4] As the century progresses we get more elaborate arrangements for lighting and watching the Inns, for their sanitation, and for the supply of water[5]—a matter which was specially important in view of the disastrous fires which occurred at the end of the seventeenth and in the eighteenth centuries.[6] All the Inns paid considerable attention to beautifying their gardens and walks. Lamb, in his essay on *Some of the Old Actors*, said of Gray's Inn Walks that, though, owing to the erection of Verulam buildings, they were not so beautiful as they had been twenty-five years ago, they were "the best gardens of any of the Inns of Court, my beloved Temple not forgotten";[7] and, in his essay on *The Old Benchers of the Inner Temple*, he praises the "classic green recesses" and the sundials of the Temple gardens, and the fountains in the Middle Temple and in New Square Lincoln's Inn.[8]

(ii) We have seen that the benchers, and the officers elected from their members, were the governing bodies of the Inns.[9] It was during the eighteenth century that the machinery, through

[1] Calendar of Inner Temple Records iii *xci-xcii*. [2] Ibid *xcii*.

[3] Black Books of Lincoln's Inn iii *xxix-xxx*.

[4] "These together made up the block of buildings fronting on Chancery Lane, now used as chambers and as a School of Arms for the Inns of Court R.V.," ibid.

[5] Ibid iii *xxxix*; in this connection "the name of Mr. John Stone must be rescued from oblivion. The Bench gave him leave in 1771 at his own expense to make (what is the first mentioned) water-closet and lay on New River water for the same, and to make a 'Buzaguloe Stove,'" ibid *xxix*; Pension Book of Gray's Inn ii *xvii-xviii*, *xxix-xxx*.

[6] For the great fire of 1678 in the Middle Temple see Williamson, History of the Temple 525-527; and for the fire of 1704 see ibid 642-643; for the fire in New Square Lincoln's Inn in 1752 see Black Books iii 473; Foss, Judges viii 92, 93-94.

[7] "I am ill at dates, but I think it now better than five and twenty years ago, that walking in the gardens of Gray's Inn—they were then far finer than they are now—the accursed Verulam Buildings had not encroached upon all the east side of them, cutting out delicate green crankles, and shouldering away one or two of the stately alcoves of the terrace—the survivor stands gaping and relationless as if it remembered its brother—they are still the best gardens of any of the Inns of Court, my beloved Temple not forgotten—have the gravest character; their aspect being altogether reverend and law-breathing—Bacon has left the impress of his foot upon their gravel walks."

[8] As to these sundials and fountains see Mr. Justice Mackinnon's edition of Lamb's Essay 8, 9, 10; and cp. Black Books of Lincoln's Inn iii 215 n., 225 n.

[9] Above 18-20, 21-22.

which the benchers and the officers of the Inns managed the affairs of the Inns, attained its modern form.

Lincoln's Inn in 1767 made a series of orders as to the salaries, duties, and perquisites of the servants of the Society.[1] The chief official was the steward, and the first butler was the second in command. Both occupied positions of considerable financial responsibility—the steward in keeping the accounts of the Inn, and the butler in collecting money due. Both were paid partly by a small salary, and partly by fees for work done, or percentages upon the money collected.[2] The orders relating to their duties and remuneration [3] show that they were largely responsible for the business management of the Inn. Gray's Inn in 1707 took some care over the transcribing of the orders of the Society, and made arrangements for their regular entry.[4] In 1716, as the result of the appointment of a committee to consider its financial position, many reforms were recommended in the number of servants employed, in their salaries, and in the control over income and expenditure.[5] In 1744, as the result of the report of a committee for auditing the treasurer's accounts, orders were made for the annual passing of his accounts, for the keeping of exact accounts by the steward and under-steward, the abolition of all perquisites, and proper vouchers for the expenditure of all sums over 40s.[6]

The improvement in the financial position of the Inns, which occurred during the eighteenth century,[7] is partly due to this stricter control over their servants. Sums due for rents and commons were more regularly collected, and extravagant

[1] Black Books iii 388-389; the list of servants and their salaries were as follows: "the Steward £45, the First Butler £20, the Second Butler £25 15s., the Third Butler £13 15s., the Fourth Butler £17 15s., the Pannier Man and Chapel Clerk £33 15s., the Chief Porter £8, the Head Porter [of New Square] £8, the Gardener £20, the Washpot £13, the Washpot's man and Hatchkeeper £6, the Boghouse Keeper £5, and the Turnspit £8," ibid 390; in 1772 the salary of the washpot was raised, and he was to be called by the more dignified name of fifth butler, ibid 411; these salaries formed but a small part of the total remuneration of the first two of these servants, see next note, and probably also of some of the others.

[2] The steward was entitled to the following fees: 10s. from every person admitted, 10s. on every admittance to a chamber, 10s. on every surrender of a chamber, 10s. on every deposit in lieu of a chamber, 12s. from every person called to the bar, 2s. 6d. for every petition presented to the bench, and £2 2s. 0d. a year for keeping the Steward's office clean; the first butler had 6d. in the £ on money collected by him, except bills for commons, 3d. in the £ for the collection of the land and window tax, 1s. in the £ on rents collected, a fee of 2s. from every person admitted a member, and the best mess and the best bottle of wine left every day at the bench table, ibid 389.

[3] Ibid 388-389.

[4] Pension Book ii 147; in 1757 "the book of alphabetical admissions and calls to ye bar" were transcribed, ibid 287.

[5] Ibid 166-167; the report concluded with these ominous words: "This committee doth conclude that without seasonable redress ye Society in all probability must sink."

[6] Ibid 245-246.

[7] Ibid *xxii*; Black Books of Lincoln's Inn iii *xxi*.

expenditure was checked. Partly it is due to the adoption of more modern methods of finance and accounting. Lincoln's Inn opened an account at Child's bank in 1743, and it was ordered that for the future "all moneys of or belonging to this Society be for the future from time to time paid into the hands of the said Bankers, and placed to the account and credit of the Treasurer for the time being, for the use of the Society." [1] A little later (1750) Gray's Inn followed suit and opened a regular account with Child's.[2] In 1775 Lincoln's Inn adopted a new and a more profitable system of letting chambers. Instead of admitting a tenant for life on the payment of a sum down, it began to let chambers from year to year at a rack rent.[3] In 1721, 1769, 1772, and 1793 Gray's Inn made orders as to the conditions under which chambers were to be let.[4] The order of 1793 deals with the terms upon which leases of chambers were renewable, and the obligation of the executors of a deceased member to assign the lease to a member. It goes on to provide (as earlier orders had provided) that leases held by members in trust for non-members were not to be renewed, that no member was to hold more than one chamber, that no trade was to be carried on in the chambers without the consent of the benchers, that all nuisances must be removed before renewals were granted, that before renewal the chambers should be inspected to see that they were in a proper state of repair, and that "no member of the Society who is in contempt of the orders of the Society shall renew his chamber till he be discharged of the contempt." [5] In 1803 the Middle Temple followed the example of Lincoln's Inn, and resolved that all chambers should be let from year to year; [6] but till 1870 benchers in order of seniority had, on making certain payments, an option to take a life interest in certain chambers known as Bench Chambers.[7]

Just as the Inns were careful in the management of their property, so they were careful to preserve their immunities and privileges. Thus in 1697 it was resolved to maintain the immunity of freedom from arrest for debt within the precincts of the Temple enjoyed by its members; [8] and the action of the benchers secured the judicial recognition of the privilege.[9] In

[1] Black Books iii 330-331.
[2] Pension Book ii *xxii-xxiii*, 246 n. 1.
[3] Black Books iii *xxix*.
[4] Pension Book ii 182, 310-311, 317, 369-370; the order of 1772 was occasioned by the fact that "some members have let their chambers to a house broker who has let the same ready furnished to persons not members of this Society."
[5] Ibid 369-370.
[6] Ingpen, Middle Temple Bench Book 39.
[7] Ibid 39-42.
[8] Calendar of the Inner Temple Records iii *xc*, 336—"this society will maintain the ancient privileges of the House and defend the prosecutions against the persons concerned in the pretended rescue of Humphrey Borlase esquire."
[9] Brown v. Borlace (1697) Skin. 684; Holt C.J. ruled that the privilege only belonged to bona-fide members, and not "to persons who come there by fraud

1774 Lincoln's Inn tried in vain to establish the exemption of New Square from the liability to pay poor rates, which was enjoyed by other parts of the Inn.[1]

Besides the management of the finances of the Inns, a large number of regulations were made to preserve their amenity, and also to preserve order within their precincts. In 1700 Lincoln's Inn ordered that all women lodging in Old Buildings or New Square should have notice to quit;[2] and in the same year it ordered that no coaches were to be admitted after 10 p.m.[3] In 1738 it was ordered that the porters

> do not permit or suffer any person whatsoever to cry, or expose to sell any goods whatsoever within the Courts and passages of this Society, and that they do from time to time clear the House from all beggars and other disorderly persons.[4]

Gray's Inn in 1761 found it necessary to enforce its order against women inhabiting chambers;[5] and in 1775 to order that no sales or auctions should be held in any of its chambers.[6] In 1711 it was

> ordered yt according to ye antient rules of this Society the gardiner admitt no ordinary men women or children into the Walkes nor noe lewd or confident women nor any in vizor maskes nor any person whatsoever when ye Walkes are wett nor suffer ye same at any time to be made a thorrowfare. And that he loke better after ye Walkes and keep ym well gravelled and in better order for ye future. And that he suffer noe person to breake any boughs from young trees.[7]

There are many other orders as to the care and use of the walks. In 1778 the discharging of fire-arms from the windows into the courts and gardens was prohibited.[8]

Since terms were kept by the eating of dinners very many orders relate to the food and drink supplied for the use of the benchers, barristers and students. At Lincoln's Inn there was a report in 1741 upon the mismanagement of the catering arrangements.[9] The report showed that there was much need for reform, since it appeared *inter alia* that the cook took nearly half the mutton brought into the kitchen, and charged extravagantly for cooking the dinners on Grand Days.[10] The number of dishes on Grand Day was diminished, and it was ordered "that French wine be drunk in the hall, council chamber, or

and shelter themselves there with an intent and purpose to cheat their creditors"; Borlace, he held, was not a bona-fide member, since he came from Gray's Inn with this fraudulent purpose "without any certificate from the Treasurer as there ought to be"; but for bona-fide members the privilege was recognized, see Calendar of Inner Temple Records iii *xc-xci*.

[1] Black Books iii *xxx*, 218-219, 479. [2] Ibid 203. [3] Ibid 206.
[4] Ibid 317. [5] Pension Book ii 295. [6] Ibid 322.
[7] Ibid 156. [8] Ibid 329. [9] Black Books iii 323.
[10] Ibid 324; and there were similar abuses at Gray's Inn, Pension Book ii 271.

buttery, only on Grand or holydays for the future at the expense of the House." [1] In 1748 orders were made as to the commons to be served in the hall in each of the four terms of the year; [2] and new regulations were made in 1762.[3] The dinners at Gray's Inn were improved in 1751, and the cost of commons slightly raised.[4]

> After the accession of George III the charges for soup and fish seem to show that there were more courses at dinner, and the fashion of port drinking was evidently followed with some avidity. . . . The allowance of the House to each mess in the hall was, in 1797, two bottles, but more could be had by paying for it.[5]

During the course of the century the dinner hour got later. At the beginning of the century it was at Gray's Inn 1 p.m. on Sundays and 2 p.m. on week days; in 1777 the Sunday dinner hour, and in 1782 the week-day dinner hour, was moved to 4 p.m.[6]

(iii) The activities of the Inns of Court and their members were necessarily far less varied than they had been in the sixteenth and seventeenth centuries.[7] We have seen that they had ceased to be colleges in which the students of the law resided and received their education; and that, in consequence, they had ceased to be in universities to which many came who had no thought of becoming professional lawyers.[8] They had become purely professional bodies. The readers' feasts had disappeared; [9] and though there was a serjeants' feast at Lincoln's Inn in 1756 on the occasion of the appointment of Lord Mansfield to the office of Chief Justice of the King's Bench,[10] it was the last but one of these entertainments. In 1768 it was ordered that, when a member of the Society became a serjeant, " no public speeches be made in the Hall, but that the treasurer wait upon the gentleman with the usual compliment [11] and the congratulations of the Society "; [12] but this was rather too drastic, and the order was rescinded in 1771.[13] The ordinary festivals of the Inns were the Grand Nights, which were regularly held. At Lincoln's Inn the Black Books give us the list of guests; [14] and

[1] Black Books iii 323. [2] Ibid 341-342. [3] Ibid 375-376.
[4] Pension Book ii *xxxi*. [5] Ibid.
[6] Ibid *xxx*; and there were similar changes at Lincoln's Inn, Black Books iii *xxxii*.
[7] Vol. iv 267-268. [8] Above 15. [9] Above 17.
[10] Black Books of Lincoln's Inn iii 360-361.
[11] That is a gift of ten guineas in a purse; see e.g. ibid 425 (1774-1775), the last of many similar entries.
[12] Ibid 392.
[13] Ibid 409; the procedure in the eighteenth century, as compared with the old ceremonial, was simple: the serjeant " was received by the masters of the Bench in the Council Chamber, from which he proceeded to the Hall where the members of the Society awaited him gowned and ready to hear the public speeches delivered by a Bencher on behalf of the Society and of the outgoing Sergeant," ibid *xxvii*.
[14] Ibid 222, 229-230, 273-274.

sometimes detailed regulations were made as to their management.[1] At Gray's Inn, as at other Inns, they were fixed by the order of the benchers; and this, says Mr. Fletcher,[2] "marks a departure from the original connection of these festivals with those of the Church."

In 1768 the benchers of the Middle Temple entertained the King of Denmark on his way to the City.[3] But such entertainments were now rare; and external events leave but little mark on the records of the Inns. National achievements were marked by thanksgiving services in chapel;[4] and the Gordon riots caused special precautions to be taken for watching and guarding the Inns.[5] In 1798 Lincoln's Inn contributed £1000 to the patriotic loan asked for by Pitt in 1797;[6] and the progress of the war is reflected in the provisions made by the Inn to fulfil its statutory obligations to provide men for the navy and army.[7] It is also reflected in the petitions for the remission of terms made by members who were serving in the army.[8]

The Inns were not unmindful of their obligations to their members and servants who had fallen on evil days;[9] and even to those who had no such moral claims upon them. There are several instances in which, for instance, Lincoln's Inn brought up and educated infants who had been abandoned in the Inn.[10]

The Inns of Chancery.

We have seen that to each of the four Inns of Court certain "lesser houses or Inns" were annexed, which were inhabited

[1] Black Books of Lincoln's Inn iii 276-277—the arrangements for Candlemas day 1726.

[2] Pension Book ii 244 n.

[3] Ingpen, Middle Temple Bench Book 93 n. 2.

[4] Black Books of Lincoln's Inn iii *xxxviii-xxxix*.

[5] Ibid iv *xiii*. [6] Ibid *xii*. [7] Ibid *xi-xii*.

[8] Ibid *xii*—"Five fellows who had been arrested while passing through France in 1802 prayed like relief. Four of them were released in 1806, but the fifth was detained as prisoner of war till 1814."

[9] "Ordered that Mr. Francis Atterbury an Antient barrester of this Society being reduced to want have five pound allowed by the Society towards his support," Pension Book of Gray's Inn ii 193 (1724). "On the petition of Patience Beaver daughter of John Beaver lately deceased who was upwards of fifty years Steward of this Society setting forth that her father dyed in very low circumstances It is ordered that the said Patience Beaver be allowed 20s. termly as the bounty of ye House during ye pleasure of ye Bench," ibid 273 (1752).

[10] "At the end of the last volume an infant left in the Inn had been taken up by the Society, clothed and boarded. His story continues in the Treasurers' Rolls: frocks and shoes are bought for him in 1776: a mad cat bites him in 1780 and one guinea's worth of powders are bought to cure him. Two years later a guinea and a half is charged for the cost of taking him by waggon to Piersbridge, on his way to school with Mr. Facer, at Staindrop County Durham. His education and board for three years cost £7 12s. a year. He is then at the age of sixteen apprenticed to a carpenter at Staindrop for seven years, with an allowance of pocket money for the next five years from the Bench of 40s. a year," Black Books iv *xiv*.

by junior students who intended in course of time to join the Inns of Court.[1] At the beginning of the eighteenth century, as in the time of Coke,[2] there were eight of these Inns of Chancery.[3] To Lincoln's Inn there were attached Thavy's Inn and Furnivall's Inn; to the Inner Temple Clifford's Inn, Clement's Inn, and Lyon's Inn; to the Middle Temple New Inn; to Gray's Inn Staple Inn and Barnard's Inn. In all cases the Inn of Court, to which the Inn of Chancery was attached, exercised some kind of control over it. But the nature of that control was by no means clearly defined.[4] It was partly a sort of visitatorial control, and partly a control over the course of legal education pursued at the Inn. It would seem from *The Case of Clement's Inn* in 1661,[5] which is very obscurely reported, that the King's Bench thought that disputes between an Inn of Chancery and its members should, in the first instance, be submitted to the Inn of Court upon which it was dependent, subject to a further appeal to the Chief Justice and the Lord Chancellor[6]—thus giving to the Inn of Court somewhat the same jurisdiction over the Inns of Chancery as the judges had over the Inns of Court.[7] On the other hand, in 1834 the court of King's Bench refused to issue a mandamus to the principal of Clifford's Inn, to attend the benchers of the Inner Temple with his records and regulations, in order that the benchers might decide whether the principal had been validly elected.[8] The court thought that the powers of superintendence possessed by the Inner Temple did not give it authority to make this demand.[9] In 1905 the court did not consider that the dependency of Clifford's Inn on the Inner Temple entitled the Inner Temple to be made trustees of the money realized by the sale of the Inn, or to intervene in the settlement of the scheme for the application of the money.[10] The control possessed

[1] Vol. ii 498. [2] 3 Co. Rep. Pref. xixb.

[3] Vol. ii 498; Strand Inn, which had once been attached to the Middle Temple, had been demolished in 1549 by the Protector Somerset when he built Somerset House, E. Williams, Early Holborn and the Legal Quarter of London ii 1460.

[4] See Smith and Kerr (1905) 74 L.J. Ch. at p. 766, *per* Farwell J., cited vol. ii 498-499. [5] 1 Keble 135.

[6] "The master and society moved for a restitution to a chamber upon a forcible entry, which was granted, but the Court would not meddle with the cause, but ordered the young men to submit, and appeal to their Inn of Court, and thence to the Chief Justice, thence to the Lord Chancellor, and they allowed a society may seize a chamber for non-residence, or want of commons of any man, and would have laid one or two of the assistants by the heels till restitution and conformity, but would not determine the right of any chamber there"; this probably means that the court would interfere in a criminal case such as forcible entry, but would not interfere in a civil dispute as to the title to chambers.

[7] Above 28-30. [8] The King v. Allen 5 B. and Ad. 984.

[9] "They [the benchers of the Inner Temple] have a general superintendence over the Inn, but we cannot say that it enables them to decide this matter," ibid at p. 989, *per* Littledale J.

[10] Smith v. Kerr (1905) 74 L.J. Ch. 766.

by the Inns of Court over the course of legal education pursued by the Inns of Chancery was the natural consequence of the fact that the Inns of Chancery were preparatory schools for the Inns of Court. The Inn of Court sent a reader to the Inn of Chancery attached to it, who delivered a course of lectures in the Inn of Chancery.[1]

The position of the Inns of Chancery was entirely changed at the end of the seventeenth and the beginning of the eighteenth centuries by two events. First, the break-down of the old system of legal education ;[2] and, secondly, by the discouragement of attornies and solicitors from becoming members of the Inns of Court, and their exclusion from call to the bar.[3]

The break-down of the old system of legal education meant that the Inns of Chancery ceased to be educational bodies. There was no inducement for any student, who wished to become a barrister, to join them ; for the Inn of Chancery could neither educate him nor call him to the bar.[4] It would seem that they lost their students very quickly after this break-down of the old system of legal education. Chamberlayne in a book entitled *The Present State of England*, which was written in 1684, said of the Inns of Chancery [5] that

There were heretofore preparatory Colledges for younger students and many were entred here before admitted into the Inns of Court. Now

[1] For readers appointed by Lincoln's Inn to Thavy's Inn and Furnival's Inn see Black Books iii 64, 99-100, 104 ; for readers appointed by Gray's Inn to Staple Inn and Barnard's Inn see Pension Book ii 43, 30 ; for readers appointed by the Inner Temple to Clifford's Inn, Clement's Inn and Lyon's Inn see Calendar of Inner Temple Records iii 434 ; for readers appointed by the Middle Temple to New Inn and their suspension in 1834, when lectures on special subjects were substituted for them, see Ingpen, Middle Temple Bench Book 104 n. 1 ; in 1854 it was said that no reader had been sent to Lyon's Inn since 1815, Parlt. Papers 1854-1855 xviii 82 ; and that no reader had been sent to Clement's Inn till two or three years ago, when the Inn applied for a reader apparently to the surprise of the Inner Temple, who had forgotten all about it ; the Temple sent three names as usual, Clement's Inn chose one, " but then they said the gentleman was out of town or away and there was not time to appoint another," ibid 88 ; at that date no readings were given or had been given for many years past in Clifford's Inn, Barnard's Inn, or Staple Inn, ibid 259, 260-261 ; in 1729 the Inner Temple ordered that the principals of the Inns of Chancery certify how often the readers did their duty, Calendar of Inner Temple Records iv 193 ; but it was necessary to repeat the order in 1746, ibid 503-504 ; and fines for not reading were almost a matter of course ; but readings were occasionally given—there is a record of a reading at New Inn in 1692, vol. vi 563 ; and in 1778 no less a person than Fearne read on the statute of Inrolments at Lyon's Inn, below 374 n. 4.

[2] Vol. vi 488-493. [3] Ibid 442-444 ; below 43.

[4] " Gentlemen are never entered at present in the Inns of Chancery with an intention of being called to the bar, for admission there would now be of no avail with regard to the time and attendance required by the Inns of Court," Bl. Comm. i 25, Christian's note.

[5] Cited by Fletcher, Pension Book of Gray's Inn ii *ix* n. 1 ; Blackstone says, Comm. i 25, " The Inns of Chancery being now almost totally filled by the inferior branch of the profession, are neither commodious nor proper for the resort of gentlemen of any rank or figure ; so that there are very rarely any young students entered at the Inns of Chancery."

they are for the most part taken up by attorneys, solicitors, and clerks who have their chambers apart and their diet at a very easie rate in a hall together where they are obliged to appear in grave long robes and black round knit caps.

In some cases the Inns of Court continued to send readers to the Inns of Chancery down to the beginning of the nineteenth century,[1] and the readers gave lectures in law to the principal ancients and members of the Inn ;[2] but in other cases, it would seem that the practice of sending these readers died out at the end of the seventeenth or the beginning of the eighteenth century.[3] But whether or not the readings continued to be given, they necessarily ceased to form part of a scheme of legal education after the Inns of Chancery had ceased to number students amongst their members.

By the end of the seventeenth century the members of the Inns of Chancery were chiefly attornies and solicitors; and we have seen that the judges tried to compel attornies to join an Inn of Court or Chancery.[4] Perhaps, in view of the reluctance of the Inns of Court to admit attornies, it was thought that attornies would join the Inns of Chancery.[5] If they had joined the Inns of Chancery in any large numbers, those Inns might have become the bodies through which the attornies' and solicitors' profession was organized, just as the Inns of Court were the bodies through which the barristers' profession was organized. But this did not happen. The Inns of Chancery continued to be small close bodies, dependent to a certain extent upon the Inns of Court. They had neither the power nor the ability to represent or organize the attornies and solicitors. This fact was so obvious that, when the Legislature wished to regulate the profession of attornies and solicitors, it gave disciplinary powers, and powers to admit to the profession, to the judges.[6] The position occupied by the Inns of Court was the result of their powers over their members and their powers to call to the bar: no such powers were given to the Inns of Chancery, because they were unfit to exercise them.

[1] Above 42 n. 1.

[2] See the evidence of Mr. Gregory, Steward of Clement's Inn, Parlt. Papers 1854-1855 xviii 88.

[3] The last notice of the appointment by Gray's Inn of a reader at Staple Inn is in 1676, Pension Book ii 43; the last notice of an appointment of a reader for Barnard's Inn is in 1675, ibid 38; in 1854 the secretary to Barnard's Inn said that neither in that nor in the preceding century had any lectures been given there, Parlt. Papers 1854-1855 xviii 261.

[4] Vol. vi 443; Cooke, Rules and Orders in the Court of King's Bench Mich. 1704; the principals of the Inns of Chancery (nothing is said in this connection of the Inns of Court) were to get a list of attornies not yet admitted into an Inn of Court or Chancery, which they were to forward each year to the Chief Justices and the Chief Baron that they might deal with offenders.

[5] Vol. vi 443 n. 5.

[6] Below 54, 61-62.

Thus the organization and discipline of the attornies' and solicitors' profession came to be exercised, not through the Inns of Chancery, but partly through the judges, and partly through the new Society of Gentlemen Practisers in the Courts of Law and Equity which was founded in the eighteenth century.[1] In 1854 the Societies of Clifford's Inn and Staple Inn pointed out to the Commissioners appointed to enquire into the arrangements for the study of the law in the Inns of Court and Chancery, that they had no occasion to provide any educational facilities, because the whole business of lectures and examinations in law had been taken over by the body which had succeeded to the Society of Gentlemen Practisers—namely, the Incorporated Law Society.[2]

In the eighteenth century the Inns of Chancery were anachronisms. They were one of those many survivals of past ages which were to be found in the law and government of England. It was suggested in 1854 by Mr. Robert Maugham, the secretary of the Incorporated Law Society, that, "inasmuch as attornies and solicitors have been for many years excluded from the Inns of Court, and derive no advantage from their libraries and lectures, the surplus rent which may be derivable from the Inns of Chancery should be applied to the improvement and the education of the attornies and solicitors and their articled clerks."[3] There was much to be said for this suggestion. But Mr. Maugham put his case rather too high, when he suggested that the Inns of Chancery had always been exclusively used by the attornies and solicitors. Moreover, there were difficulties in appropriating the sites of the Inns of Chancery for this purpose in those cases in which the Inns were not the owners of the freehold, but merely tenants holding under lease at a rent. Thus, Lincoln's Inn had acquired the freehold of Furnival's Inn in 1547,[4] and of Thavy's Inn in 1551;[5] and on the expiration of their leases, they had sold these properties. Thavy's Inn was sold in 1771,[6] and Furnival's Inn was leased in 1818,[7] and subsequently sold.[8] Similarly, Barnard's Inn was held

[1] Vol. vi 443; below 63 seqq.
[2] Parlt. Papers 1854-1855 xviii 259-260, 261.
[3] Ibid 120.
[4] E. Williams, Early Holborn and the Legal Quarter of London i 487.
[5] Ibid 845.
[6] Black Books of Lincoln's Inn iii 397, 398, 399, 401, 406, 413; the purchase price was applied to the building of Stone Buildings, ibid *xxxiii*, 399.
[7] Ibid iv 150.
[8] The purchasers were the Prudential Assurance Co., E. Williams, op. cit. i 492; Mr. Maugham, in his evidence to the commissioners on the Inns of Court, seemed to think that the improved rent got by Lincoln's Inn when they refused to renew the lease of Furnival's Inn ought to have been applied to the education of attornies and solicitors, Parlt. Papers 1854-1855 xviii 120; but it was pointed out that it was not clear that the original inhabitants of the Inn had at all times been only attornies and solicitors, and that the freehold was, after all, the property of Lincoln's Inn, ibid.

under lease from the Dean and Chapter of Lincoln; but it found itself unable to find the money to renew the lease in 1888—which is not surprising if Dickens's description of the Inn in *Great Expectations* is correct [1]—and it dissolved itself in that year.[2] It was impossible to accept Mr. Maugham's suggestion without qualifications. But in 1900 it was found possible to give substantial effect to it on the occasion of the dissolution of Clifford's Inn. The freehold of that Inn had been conveyed to its members in 1618; and the conveyance, after reciting that the property had for many years been "used and employed as an Inn of Chancery for the furtherance of the study and practise of the Common Lawes," provided that

> The said capitall messuage now called by the name of Clifford's Inn shall for ever hereafter reteyne and keep the same usuall and antient name of Clifford's Inn, and shall for ever hereafter be contynued and employed as an Inn of Chauncery for the good of gentlemen of that Societie and for the benefyt of the Commonwelthe as aforsd, and not otherwise, nor to any other intent or purpose.[3]

The Court therefore found no difficulty in holding that the property was held on a charitable trust, and consequently that the existing members could not divide the property amongst themselves.[4] Half the money realized by the sale was handed over to the Law Society, and half to the Council of Legal Education to be devoted to legal education.[5] Similarly, the purchase money of New Inn, after existing interests had been compensated, was devoted to legal education.[6]

The decision of the Court in the case of Clifford's Inn effectively got rid of the notion, which was held by many in 1854 and later, that the Inns of Chancery were the private property of their members.[7] It is clear that, like the Inns of Court, and unlike the Serjeants' Inns, they held their property on trust, *inter alia*, for the education of their members. If this question had been fought out and decided earlier, no doubt more money might have been secured for legal education—Staple Inn, for instance, was sold by its members in 1884 to the Prudential Assurance Co. for £68,000.[8] However that may be, it was

[1] Chap. xxi.

[2] E. Williams, op. cit. ii 1064; the property was subsequently bought by the Mercers' Co. for their school; the hall of the Inn is now used as the dining hall of the school, ibid.

[3] Smith v. Kerr [1900] 2 Ch. at pp. 512, 513.

[4] [1900] 2 Ch. 511, affirmed on appeal [1902] 1 Ch. 774.

[5] Smith v. Kerr (1905) 74 L.J. Ch. at p. 767.

[6] Blake Odgers, Six Lectures on the Inns of Court and Chancery (1912) 55.

[7] Parlt. Papers 1854-1855 xviii 83; cp. the unsuccessful argument for the plaintiffs in Smith v. Kerr [1900] 2 Ch. at pp. 515-516.

[8] Blake Odgers, Six Lectures on the Inns of Court and Chancery 51, has rightly said that "the thanks of the public are due to the Company for preserving this ancient Inn with its hall and belfry, garden and sundial intact"; and the

obvious, long before the close of the eighteenth century, that Inns of Chancery were moribund and served no useful purpose. Some of them were in debt, and unable to maintain their property in tenantable repair. In these circumstances their dissolution, and the sale of their property to owners who could make a better use of it, were inevitable. Though the halls and sites of some of the Inns of Chancery still remain to remind us of institutions which once played a part in the education and organization of the legal profession, the Societies which once occupied those Inns have all at length been dissolved.

Lamb's genius, and his love for the Inns of Court and their old benchers, have cast something of a halo around the outward aspect of the Inns and their rulers in the eighteenth century.[1] In fact those rulers had the virtues and the defects of the century in which they lived. In a leisurely and rational way they adapted the organization of their Inns, the conditions of call to the bar, and the standards of professional conduct, to modern conditions. But they were tolerant of abuses. They accepted, without any serious attempt to apply a remedy, the collapse of the collegiate life and the educational system of the Inns, which had taken place at the end of the seventeenth century. Perhaps this was inevitable in an age when the educational system of the universities had sunk almost as low.[2] But there is no doubt that their acquiescence in this abuse reduced the Inns of Chancery to useless anachronisms; that, in the following century, it helped to withdraw money from the endowment of legal education, by fostering the belief that those Inns were the private property of their members; and, as we shall see later, that it delayed the recognition of the need for a system of legal education, and therefore the discussion and solution of the difficult problem of the form which that system should take.[3]

Doctors' Commons.

I have already said something of the origins of Doctors' Commons.[4] An "association of doctors of law and of the advocates of the church of Christ at Canterbury" had been formed in 1511; it had begun to inhabit the premises then

more so when it is remembered that the principal of Staple Inn stated in his evidence to the Inns of Court Commission in 1854, Parlt. Papers 1854-1855 xviii 91, that, having no money to spend on repairs, the Inn was contemplating pulling down its front—a front which is the finest specimen of Elizabethan household architecture in London.

[1] Lamb was born in the Temple on Feb. 10 1775 at 7 Fig Tree Court, Mackinnon's ed. of the Old Benchers of the Inner Temple, 7; his father—the Lovel of the Essay—was then first waiter at the Temple, and when he died he had been in the service of the Temple for forty-three years, ibid 48-51.

[2] Below 83-85. [3] Below 100-101. [4] Vol. iv 235-236.

known as Mountjoy House, and afterwards known as Doctors' Commons, in 1565; and it had been incorporated in 1767 under the name of "the College of Doctors of Law exercent in the Ecclesiastical Courts."[1] The conditions laid down in the charter for becoming a fellow of Doctors' Commons, and for becoming an advocate, embody the practice which had been worked out in the preceding centuries. I have already said something of these conditions.[2] A candidate must be a doctor of Civil Law of Oxford or Cambridge. He must have got a fiat from the archbishop ordering the Dean of the Arches to admit him as an advocate; and it should be noted that the issue of the fiat was in the absolute discretion of the archbishop, so that he could not be compelled by writ of mandamus to grant it.[3] The candidate, having got his fiat, must have been admitted as an advocate by the Dean of the Arches at a session of his court. After admission "a year of silence" was imposed on him, during which time he must have attended the courts. Any person thus admitted was qualified to be admitted as an advocate in the court of Admiralty. Doctors' Commons was thus, like the Serjeants' Inns,[4] the club of the civilians, at which the problems relating both to the advocates and proctors could be discussed. It no doubt helped, like the Serjeants' Inns, to promote the study of the law; but it was in no sense an educational institution like the Inns of Court or Chancery.[5]

From 1565 the association held under a lease granted by the Dean and Chapter of St. Paul's to the Master and Fellows of Trinity Hall on trust for the association.[6] The lease contained a covenant that if at any time the Master and Fellows surrendered the lease, the Dean and Chapter would, on payment of a fine of £20, grant a new lease containing the same covenants. The old premises were burnt down in the fire of London; and in 1670 a new lease was granted by the Dean and Chapter for sixty years.[7] On its expiration difficulties arose as to its renewal. Statutes

[1] The charter will be found in Parlt. Papers 1859 sess. 1 xxii 20-22.

[2] Vol. iv 236; see also Burn, Ecclesiastical Law, tit. *Advocate;* Parlt. Papers 1844 xxxviii 445; it would appear that in the Northern Province the only qualification was that the applicant must be a barrister, and that the number of advocates was limited to four; they had the exclusive right to practise in the ecclesiastical courts, but in cases of difficulty counsel on the Northern circuit were occasionally taken in.

[3] The King v. the Archbishop of Canterbury (1807) 8 East 213.

[4] Above 14-15. [5] Below 49.

[6] This history of the site of Doctors' Commons is based on the statement of facts in Bettesworth v. the Dean and Chapter of St. Paul's (1728) 1 Bro. P.C. 240; and Parlt. Papers 1859 sess. 1 xxii 22-24.

[7] This was the result of the decree of the court set up by 19 Charles II c. 2 as amended by 22 Charles II c. 11 §§ 32, 33, to settle disputes arising in connection with houses burnt in the fire, vol. vi 575.

of 1571 and 1572 had disabled ecclesiastical corporations from granting leases for more than forty years,[1] and from covenanting for perpetual renewal.[2] In 1726 the court of Chancery decided that the Dean and Chapter were not bound to renew the lease on the payment of the old fine of £20. This decision was reversed by the House of Lords after consultation with the judges, and the association got a renewal for forty years. This reversal was based upon a somewhat strained construction of the statutes; and it may have been in part due to the offer of the Dean and Chapter to grant a single renewal for forty years;[3] for it was expressly ordered by the House of Lords that this lease should not contain a covenant for renewal. It was therefore held that the Dean and Chapter were not bound, on the expiration of this lease, to renew on payment of the old fine. In these circumstances it was desirable that the association should be able to treat directly with the Dean and Chapter. It was for this reason that it thought it necessary in 1767 to get a charter of incorporation.[4] The newly incorporated College got a renewal of the lease in 1770, but at a greatly increased fine. The whole expense of the transaction amounted to £4,200, which the College raised by a mortgage of its lease and by gifts from its members. As the result of a petition to the King a grant was made to the College of £3,000 out of the droits of the Admiralty.[5] With this money, and the money raised by the College, the fee simple was bought. Under the terms of the agreement with the Dean and Chapter the College bound itself to pay in perpetuity a rent of £105 to the Dean and Chapter. The whole transaction was confirmed in 1783 by a private Act of Parliament.[6] Thus the

[1] 13 Elizabeth c. 10 § 3; 14 Elizabeth c. 11 §§ 17 and 19; vol. iv 490.

[2] 13 Elizabeth c. 10 § 5; it was a question how far this clause had been modified by 14 Elizabeth c. 11 §§ 17 and 19.

[3] It was said in argument that "the respondents were willing to treat with the Doctors for a single lease of forty years, without any covenant of renewal to be inserted in it"; Fry, Specific Performance (6th ed.) 469, treats the decision as authority for the proposition that "the Court will probably be anxious to execute a contract *cy pres*, where by subsequent legislation a contract originally valid may have become invalid in part"; the correctness of his view rests on the assumption that 13 Elizabeth c. 10 § 5 had been modified by 14 Elizabeth c. 11 §§ 17 and 19; but if so, then the Dean and Chapter might have granted a lease with a covenant to renew inserted in it; the order made by the House is really a somewhat illogical compromise.

[4] The names of the original members of the corporation were George Hay, Sir Thomas Salusbury, James Marriott, Arthur Collier, William Wall, Andrew Coltee Ducarel, Dennis Clarke, John Bettesworth, George Harris, William Macham, Peter Calvert, William Wynne, Francis Simpson, Thomas Bever, William Burrell, Claude Champion Crespigny, and William Compton.

[5] This was not a very large payment for the accommodation afforded by the College for nearly two hundred years to the court of Admiralty, the Prize court, and the ecclesiastical courts.

[6] 23 George III c. xxx; its title is "An Act for carrying into execution an agreement between the Dean and Chapter of St. Paul's London, and the College of Doctors exercent in the ecclesiastical and Admiralty Courts, for vesting certain

premises occupied by the advocates of Doctors' Commons had been paid for (with some small help from the government) by its members, and the rent reserved to the Dean and Chapter of St. Paul's was also paid by them. Therefore when, in 1857, its charter was surrendered under a power conferred by the statute which established the new probate court,[1] and the College was dissolved, it was recognized by the Legislature that there was no legal objection to the division of its property amongst its existing members.[2] This view was opposed by Dr. John Lee in a memorial which he addressed to the visitors of the College.[3] He contended that the surrender of the charter of the College and the sharing out of its property was a breach of a public trust.[4] But, seeing that the College had never performed any educational functions, and that the property had been purchased by its members for purposes which could now no longer be carried out, it is impossible to support this contention.

The buildings of the Doctors' Commons which existed in the eighteenth century, and down to its dissolution in 1857, "differed little," says Mr. Senior,[5] "from still existing seventeenth-century aggregations of chambers in the Temple and elsewhere." There were two quadrangles. The larger quadrangle was entered by an archway from Knightrider Street, and opposite to this archway was a second archway, which led into the second quadrangle and a garden. Besides the dwellings of the advocates, Doctors' Commons included a hall, a dining-room, and, over the dining-room, a well-stocked library, and the prerogative office, where the original wills of all who died in the province of Canterbury were insecurely housed.[6] It was in the hall of the Commons that the ecclesiastical courts and the court of Admiralty were held from 1572 onwards. The best description of the appearance of the hall and of a session of the court is to be found in the following passage from *David Copperfield*:[7]

> Mr. Spenlow conducted me through a paved court yard formed of grave brick houses, which I inferred, from the Doctors' names upon

tenements in the City of London, called Doctors' Commons, held by the said College under the said Dean and Chapter by leases for years in the said College in fee simple and reserving thereout a certain yearly rent to the said Dean and Chapter, and their successors for ever."

[1] 20, 21 Victoria c. 77 § 117. [2] §§ 116, 117.

[3] Parlt. Papers 1859 sess. 1 xxii 24-34.

[4] "Your memorialist humbly submits that a surrender of the said charter of incorporation would amount to an abandonment of a sacred trust . . . and that the appropriation of the estate and property of the said college for the benefit of the persons for the time being members thereof, would be repugnant to fair dealing with a public trust, and inconsistent with the plain dictates of public duty," ibid 31.

[5] Doctors' Commons and the Old Court of Admiralty 101.

[6] See Dickens's account of the Prerogative Office in *David Copperfield*, chap. xxxiii.

[7] Chap. xxiii.

the doors, to be the official abiding places of the learned advocates . . . ; and into a large dull room, not unlike a chapel to my thinking, on the left hand. The upper part of the room was fenced off from the rest; and there on two sides of a raised platform of horseshoe form, sitting on easy old fashioned dining room chairs, were sundry gentlemen in red gowns and grey wigs whom I found to be the Doctors aforesaid. Blinking over a little desk like a pulpit desk, in the curve of the horseshoe, was an old gentleman, whom, if I had seen him in an aviary, I should certainly have taken for an owl, but who, I learned, was the presiding judge. In the space within the horseshoe, lower than these, were sundry other gentlemen of Mr. Spenlow's rank, and dressed like him in black gowns with white fur upon them, sitting at a long green table. . . . The public represented by a boy with a comforter, and a shabby genteel man secretly eating crumbs out of his coat pockets, was warming itself at a stove in the centre of the court. The languid stillness of the place was only broken by the chirping of this fire and by the voice of one of the Doctors, who was wandering slowly through a perfect library of evidence, and stopping to put up, from time to time, at little roadside inns of argument on the journey. Altogether I have never, on any occasion, made one at such a cosey, dosey, old fashioned, time forgotten, sleepy-headed little family party in all my life; and I felt that it would be quite a soothing opiate to belong to it in any character—except perhaps as a suitor.

Dickens was not a lawyer. We who are lawyers must not forget that this description, though substantially true from the point of view of a spectator, is not the whole truth. It does no doubt represent the external appearance of the court on an ordinary day, when it was dealing with a dull case. But it is well to remember that it was at these little family parties that the foundations of our modern Admiralty law were laid, that our modern prize law was created, that much international law was made, and that many of the principles of our modern probate and divorce law were worked out. And though the small number of the advocates, and their collegiate life in Doctors' Commons, helped to give their meetings the characteristics of a little family party, let us not forget it was a talented little family. We shall see later in this chapter [1] and in the following chapter, that some of its members, as judges or as advocates, have left a permanent mark upon all those various branches of law which once made up the sphere of the civilians' practice.[2]

[1] Below 646 seqq.

[2] Nys has said: "Le Collège des docteurs en droit avait eu une longue et belle carrière. Pendant 347 ans, il avait fourni aux cours de justice de droit civil, une série de magistrats remarquables; il avait donné aux mêmes cours des avocats savants; il avait fait davantage encore; il s'était constitué, pour ainsi dire, en école de droit romain; . . . il assistait à l'affirmation et au développement du droit des gens; . . . il contribuait à exposer . . . le droit de la guerre maritime sur lequel l'Angleterre imprimait une marque distinctive; enfin il mettait à la disposition du gouvernement des hommes versés dans la science juridique," Le Droit Romain, Le Droit des Gens, et le College des Docteurs en Droit Civil 123.

It was a very varied practice, and it was conducted in many various courts. It is not therefore surprising to find that the majority of the small body of advocates had official positions in one or other of the courts in which they practised. The Law List for 1779 shows that, out of twelve advocates, nine held official positions of one sort or another, most of which involved the performance of judicial duties; and even if an advocate did not hold one of these positions, he might always be called upon to act as one of the civilian members of the High Court of Delegates,[1] or as a deputy for the judge of the court of Admiralty.[2] These characteristics of the practice of the civilians were hit off exactly by Dickens. He said: [3]

> You shall go to Doctors' Commons one day, and find them blundering through half the nautical terms in Young's Dictionary, apropos of the "Nancy" having run down the "Sarah Jane," or Mr. Pegotty and the Yarmouth boatmen having put off in a gale of wind with an anchor and cable to the "Nelson" Indiamen in distress; and you shall go there another day, and find them deep in the evidence, pro and con, respecting a clergyman who has mis-behaved himself; and you shall find the judge in the nautical case, the advocate in the clergyman's case, or contrariwise. They are like actors: now a man's a judge, and now he is not a judge; now he's one thing, now he's another! Now he's something else, change and change about; but it's always a very pleasant, profitable little affair of private theatricals, presented to an uncommonly select audience.

Having dealt with the provisions made for the organization and discipline of the "higher" branches of the profession, we must now deal with the provisions made for the organization and discipline of the "lower" branch.

The Attornies and Solicitors.

At the beginning of the eighteenth century, the attornies and solicitors, though different in their origins, had come to form one homogeneous class. Technically, the attornies were specially connected with the common law courts: the solicitors with the court of Chancery. The reason for this I have explained.[4] But, since most London attornies were also solicitors, and *vice versa*, the differences between them had ceased to be substantial. They were, in fact, merely historical survivals.[5] It was in the course of this century that this class of legal

[1] Vol. i 605.

[2] Travers Twiss, Black Book of the Admiralty (R.S.) iv 459 n. 1, says that "in the ancient College of Advocates in London, the members of the College were surrogates of the Judge of the High Court of Admiralty, and could lawfully act for him in his absence"; whether or not this is true at later periods in the history of the court, it was true in the sixteenth century, Senior, Doctors' Commons and the Old Court of Admiralty 78-79.

[3] David Copperfield, chap. xxiii.

[4] Vol. vi 453-456.

[5] Ibid 456-457; 2 George II c. 23 §§ 10, 20, 21; 23 George II c. 26 § 15.

practitioners was placed on its modern basis, partly by the enactments of the Legislature and the rules made by the courts, and partly by the growth of the Society of Gentlemen Practisers in the courts of Law and Equity.[1]

Since the attornies and solicitors had ceased to belong to the Inns of Court,[2] and since the Inns of Chancery were close bodies which were showing marked signs of decadence,[3] they had no professional body which could provide adequately for their organization and discipline. It was for this reason that this branch of the legal profession was far more closely regulated by the Legislature than the other branch of the profession.[4] In fact, the legislation of this century, together with one or two decided cases, introduces some of the leading principles of the law relating to attornies and solicitors. But this method of regulation, though it remedied some of the more obvious abuses and some of the more obvious defects in the law, could not create and maintain a high standard of professional competence and honour. To secure these things, and also to secure the enforcement of the statute law, an organization which could exercise a more continuous and a more domestic control was needed. We have seen that this need was met by the formation, at some date before 1739, of "the Society of Gentlemen Practisers in the Courts of Law and Equity."[5] This Society did what the Legislature could not do. It safeguarded very effectively the interests of this branch of the legal profession;[6] it exercised a very wholesome discipline over its members;[7] and it suggested reforms in many branches of the law.[8] In particular, it suggested legislation as to attornies and solicitors,[9] and it put the relations between them and the bar on their modern footing.[10] I shall therefore deal with the organization and discipline of this branch of the legal profession under the two following heads: (1) The regulations made by the Legislature and the Courts; and (2) the work of the Society of Gentlemen Practisers in the Courts of Law and Equity.

(1) *The regulations made by the Legislature and the Courts.*

We have seen that in the seventeenth century both the Legislature and the courts had attempted to regulate and

[1] Below 63 seqq. [2] Vol. vi 441-443; above 26. [3] Above 43.

[4] "In this country few professions are so old as the solicitors and probably none is so stringently regulated or so jealously supervised by the state. From the first day of his apprenticeship to the last day of his practice every action of the solicitor is subject to regulations laid down by Parliament; his education, his right to practise, his relations to his employers, his remuneration, all are minutely prescribed by the Legislature," E. B. V. Christian, A Short History of Solicitors, Pref. vi.

[5] Vol. vi 443; below 63 seqq. [6] Below 67-72. [7] Below 66-67.
[8] Below 72-73. [9] Below 72. [10] Below 73-74.

discipline attornies and solicitors.[1] A statute of 1605 [2] had legislated on the subjects of out-of-pocket expenses, bills of costs, delaying suits to increase costs, the conditions of admission to the profession, and the practice of allowing an unqualified man to act in the name of an admitted attorney. Attornies and solicitors were officers of the courts to which they were attached; [3] and the courts used their powers of control over their officers to punish cases of misconduct brought to their notice.[4]

But, at the beginning of the eighteenth century, it had become clear that more elaborate and more stringent rules for the regulation and discipline of attornies and solicitors were needed. Complaints were made of the number of attornies; [5] and the difficulty of applying any measure of discipline was increased by the existence of "vagabond attornies," that is attornies with no fixed address.[6] The judges attempted to remedy this evil by making rules that all attornies must join an Inn of Court or Chancery, in order that they might have a fixed address; but this rule could not be enforced.[7] In 1768 the King's Bench, and a little later the Exchequer, instituted a list of the names and addresses of attornies practising within ten miles of London or Westminster.[8] But it was not till later that "the registration of the annual certificates, the establishment of the system by which every country solicitor has a London agent, and London solicitors must have an address for service of proceedings within three miles of the Law Courts, closed the controversy, and 'vagabond attornies' were no more." [9]

We cannot, it is true, take literally all that is said to the disadvantage of the attornies in the plays and novels of the period [10]—the wicked lawyer is a stock character. But there is no doubt that attornies were too easily admitted; and probably many practised as attornies without troubling to obtain regular admission to the profession.[11] Chief Baron

[1] Vol. vi 434-435.
[2] 3 James I c. 7.
[3] Vol. vi 434; Bl. Comm. iii 26.
[4] Ibid.
[5] E. B. V. Christian, A Short History of Solicitors 107-108, citing a pamphlet of 1707; Evelyn in his Diary July 4, 1700 records that the House of Commons complained of the "exorbitant number" of attornies, cited ibid 104; Hale, History of the Common Law (6th ed.) 214-215 made the same complaint.
[6] Christian, op. cit. 106.
[7] Vol. vi 443; above 43.
[8] Christian, op. cit. 105-106; in the same year the Society of Gentlemen Practisers were in favour of applying to judges of the Common Pleas to make a similar rule, Records 116.
[9] Christian, op. cit. 106.
[10] For illustrations see ibid 123-130; for Fielding's views as to the "Newgate solicitors" and other undesirable types of attorney see B. M. Jones, Henry Fielding 83, 107-108, 109, 201.
[11] Below; Fielding says of lawyer Scout in *Joseph Andrews*, Bk. I c. 12, that he was "one of those fellows who without any knowledge of the law, or being bred

Gilbert in his *History and Practice of the High Court of Chancery*, which was written at the beginning of the eighteenth century, emphasized the need for the regulation of the solicitors who practised in that court in order to secure their competence. "This," he said, "would prevent multitudes of most frivolous and vexatious suits; it would at once break the neck of *Fleet* and *Wapping* solicitors; it would take off that odium that every broken tradesman turns solicitor." [1] The need for regulation was shown by the fact that many attornies were wholly ignorant of law, and some were criminals.[2] In 1725 the Legislature thought it necessary to provide that, if any person convicted of forgery or perjury or common barratry practised as an attorney or solicitor, he should be transported for seven years; [3] in 1739 that no attorney or solicitor who was in prison should be entitled to begin any action on behalf of a client; [4] and in 1760 that attornies or solicitors embezzling their client's money should not be able to take the benefit of the Act passed in that year for the relief of insolvent debtors.[5]

But before the passing of the two last-mentioned Acts the Legislature had passed a comprehensive Act for the regulation of attornies and solicitors. This Act, which was passed in 1729,[6] and the later Acts which supplemented it, are the basis of many of the provisions of the modern statute law which now govern solicitors.[7]

The Act dealt, in the first place, with the qualifications for admission as an attorney or solicitor. The candidate for admission must take the oath set out in the Act, and get himself enrolled in the court or courts in which he intended to practice.[8] The judges, before admitting a candidate, must "examine and enquire, by such ways and means as they shall think proper, touching his fitness and capacity to act as an attorney." [9] Candidates were in future to have been articled by a contract in writing for five years before they were capable

to it, take upon them, in defiance of an Act of Parliament, to act as lawyers in the country, and are called so. They are the pests of society, and a scandal to a profession, to which indeed they do not belong, and which owes to such kind of rascallions the ill-will which weak persons bear towards it"; this is borne out by the recital to § 12 of 22 George II c. 46.

[1] At p. 217; for this book see below 182-183.

[2] Below 58-59, 61-62.

[3] 12 George I c. 29 § 4.

[4] 12 George II c. 13 § 9; but he could carry on suits begun before his imprisonment, § 10.

[5] 1 George III c. 17 § 31.

[6] 2 George II c. 23.

[7] The two classes of attornies and solicitors were in theory distinct down to the Judicature Acts; § 87 of the Judicature Act (36, 37 Victoria c. 66) provided solicitors, attorneys, and proctors should for the future be called "Solicitors of the Supreme Court."

[8] 2 George II c. 23 §§ 1 and 3; the oaths are set out in §§ 13 and 14 of the Act.

[9] §§ 2, 4, 6, 8.

of being admitted.[1] If the attorney or solicitor to whom they were articled died, or the contract was otherwise terminated, the clerk could serve the residue of his term with another master.[2] It was specially provided that these rules as to admission were not to require or authorize the judge of any court to admit a larger number of attornies "than by the ancient usage and custom of such court hath been heretofore allowed."[3] And, in order to provide a further safeguard against the increase in the number of attornies and solicitors, it was provided that no one should take more than two articled clerks.[4] In 1749 it was enacted that within three months of entering into articles, an affidavit as to their execution must be made and enrolled in the court to which the attorney or solicitor was attached.[5] No attorney or solicitor who had ceased to practice was to take an articled clerk;[6] and the clerk, during the whole period of his articles, must "continue and be actually employed . . . in the proper business practice or employment of an attorney or solicitor," and must swear an affidavit to that effect.[7] All attornies and solicitors when admitted must be enrolled in their proper courts.[8] All persons who took any steps to prosecute or defend an action or suit without having been regularly admitted, were made liable to a fine of £50 and to incapacity to conduct any action or suit.[9]

In the second place, the Act of 1729, like the Act of 1605,[10] attempted to suppress the practice of permitting unqualified persons to conduct a practice under the cover of a qualified practitioner. The admission of attornies, who permitted this use of their names, was to be vacated.[11] In 1749 it was found necessary to repeat this provision. Attornies and solicitors found guilty of this practice were to be struck off the roll, and could be imprisoned for a year.[12] As a further safeguard, it was provided in 1729 that all writs of execution, and warrants made out on such writs, and copies thereof, must, before service, be endorsed with the attorney's or solicitor's name.[13]

In the third place, the Act made some detailed provisions as to costs,[14] the need for which is shown by an example which Fielding gives in *Tom Jones*, of a debt "which an attorney brought up by law charges from 15/- to £30."[15] No attorney

[1] §§ 5 and 7; in 1733 relief was given to clerks already articled by a contract not in writing, 6 George II c. 27.
[2] 2 George II c. 23 § 12.
[3] § 11.
[4] § 15.
[5] 22 George II c. 46 §§ 3-6.
[6] § 7.
[7] §§ 8 and 10.
[8] 2 George II c. 23 § 18.
[9] § 24.
[10] 3 James I c. 7.
[11] 2 George II c. 23 § 17.
[12] 22 George II c. 46 § 11.
[13] 2 George II c. 23 § 22; but the absence of this indorsement was not to vitiate the writ, 12 George II c. 13 § 4.
[14] 2 George II c. 23 § 23; but these provisions did not apply to bills for fees due from one attorney or solicitor to another, 12 George II c. 13 § 6.
[15] Tom Jones, Bk. XVIII chap. 6, cited B. M. Jones, Henry Fielding 109.

or solicitor was to begin any action for his costs till the expiration of a month from the delivery of a bill. The bill was to be written "in a common legible hand, and in the English tongue (except law terms and the names of writs), and in words at length [1] (except times and sums)," and signed by the attorney or solicitor. On an application by the client to the judge of the court in which the business charged for, or the greater part of it, was transacted, the judge must order the bill to be taxed by the proper officer of the court. Pending taxation no action on the bill was to be begun. When the bill had been taxed the client must pay to the attorney or solicitor the sum found to be due, and in default he could be attached. Conversely, if it was found that the attorney or solicitor had been overpaid, he must pay the amount found due, and in default he could be attached. If a sixth part or more of the bill were taxed off, the attorney or solicitor must pay the costs of taxation: if less than a sixth were taxed off, the court could make what order it saw fit.

The Act of 1729 made it necessary that persons who wished to practise as attornies or solicitors in all the most important courts of England,[2] must be admitted to practise in the manner prescribed by the Act. But, in the first place, it did not apply to all courts, and, in the second place, it still permitted persons qualified in other ways to practise.

The first of these modifications of the general principle of the Act was got rid of by Acts passed a few years later. In 1739 it was enacted that persons who wished to practise in the county courts must be admitted to practise in accordance with the Act of 1729.[3] In 1749 the same provision was made as to persons practising as attornies or solicitors at general or quarter sessions.[4]

The second of these modifications was due to historical causes. The attorney was an officer of the court or courts to which he was attached, and he was closely connected with the clerical staff of those courts.[5] It was for this reason that the orders of the judges, which regulated the admission of attornies before the Act of 1729, had allowed that service for five years with a clerk of one of the courts of common law qualified for admission.[6] In the case of solicitors who practised before the courts of Chancery the connection with the clerical staff of the courts was still closer. In theory the work of the solicitor was done by the clerical staff of the court—by one of the Six or

[1] But he was allowed to use "such abbreviations as are now commonly used in the English language," 12 George II c. 13 § 5; for a case on the construction of this section see Reynolds v. Caswell (1811) 4 Taunt. 193.

[2] The courts are enumerated in §§ 1 and 3.

[3] 12 George II c. 13 § 7.

[4] 22 George II c. 46 § 12.

[5] Vol. vi 434.

[6] Ibid 436.

Sixty Clerks.[1] But we have seen that, long before the close of the eighteenth century, the parties employed their own solicitors; and that the employment of one of the Six or Sixty Clerks had become an antiquated survival, which was retained because it was profitable to these Clerks.[2] In these circumstances it was inevitable that some exceptions should be made in favour of persons who had served as clerks to some member of the clerical staff of the courts of common law, or to one of the Six or Sixty Clerks of the court of Chancery. The Act of 1729 allowed the prothonotaries of the court of Common Pleas, the secondary of the court of King's Bench, and the prothonotaries of certain other courts, to have three clerks, who, after a service of five years, were to be qualified to be admitted as attornies.[3] It also allowed certain officials of the courts of common law and the court of Chancery to be admitted, as they had been admitted previously to the Act; and that they should be able to "practise in their respective courts and offices in like manner as they might have done before the making of this Act."[4] This saving allowed them to practise as attornies in the court to which they were attached, and also in other courts in the name of an attorney of that court.[5] Moreover, a clause in the Act of 1749,[6] which was opposed by the Society of Gentlemen Practisers,[7] enabled a person who had been admitted as a sworn clerk in the office of the Six Clerks, or who had been articled to and served for five years as a clerk to a sworn clerk, to be admitted as a solicitor.

It was not till the legislation of the nineteenth century that this modification of the Act of 1729 was got rid of. During the eighteenth and early nineteenth centuries these officials of the courts, and clerks articled to these officials, were entitled to be admitted as solicitors or attornies. Thus Samuel Romilly was articled in 1773 to one of the sworn clerks of the court of Chancery, who acted, like most of the other clerks, both as a clerk in court and as a solicitor.[8] Samuel Romilly at that time

[1] Vol. vi 455. [2] Ibid; vol. ix 369-370. [3] 2 George II c. 23 § 16.
[4] §§ 26 and 27; we have seen, above 12, that the Act did not apply to the solicitors of certain government departments, § 28.
[5] § 10. [6] 22 George II c. 46 § 16.
[7] Records 9, 14, 16, 35, 300-302.
[8] "At the age of sixteen I was articled to Mr. William Michael Lally, one of the sworn clerks in Chancery, for a period of five years. . . . His business lies in a very narrow compass: it consists almost entirely in making copies of bills, answers, and other pleadings in Chancery; in receiving notices of motions to be made in suits, and the service of orders pronounced by the court, and transmitting them to solicitors of the different suitors; and in occasional attendance upon the Court of Chancery at the hearing of causes, and upon the masters in Chancery when they are proceeding upon matters referred to them. . . . Mr. Lally acted, as indeed did most of the other clerks, as a solicitor in Chancery as well as a clerk in court; and his business of a solicitor procured me much more attendance upon the court, and in the masters' offices, than I should otherwise have had," Romilly, Memoirs and

intended to qualify for a place in the Six Clerks' office; but his service under articles would have enabled him to practise as a solicitor, and also to be admitted as an attorney in the common law courts. Though this modification of the Act of 1729 was long lived, it was beginning to be seen that there was a distinction between the clerical staff of the courts and the attornies and solicitors. All these persons were, it is true, officers of the courts to which they were attached; but whilst the former held an office in those courts, the latter were merely subject to the discipline of the court. In 1749 it was enacted that clerks of the peace, deputy clerks of the peace, under-sheriffs, and their deputies, were not to act as attornies or solicitors in the courts of those places in which they performed their official duties.[1] In the nineteenth century the new organization of the clerical staff of the courts,[2] and the new rules for their recruitment,[3] coupled with the new rules as to the admission of attornies and solicitors, have got rid of the old connection, which once existed, between the official staff of the courts and the attornies and solicitors. The last trace of this connection disappeared in 1888.[4]

All these statutes passed to regulate attornies and solicitors presupposed the principle that they were officers of the courts to which they were attached,[5] and, as such, subject to the discipline of these courts. The courts could (i) decide whether a person was fit to be admitted as, or to continue to be, an attorney or solicitor, and it could punish him for professional misconduct; (ii) they could make rules as to admission or as to professional conduct; and (iii) they could settle the relations between attornies and solicitors and their clients.

(i) In *Frazer's Case*[6] the court of King's Bench decided that a turnkey of the King's Bench prison was not a fit person to be an articled clerk. It appeared that Frazer, an attorney, had taken the turnkey as his articled clerk in order to get business in the prison. The turnkey paid nothing for his articles, nor did he act for Frazer except in matters relating to the prison. Since the turnkey had been articled, Frazer

Diary i 21-22; the fact that the business of a sworn clerk lay in so "narrow a compass" explains why the Society of Gentlemen Practisers objected to the admission of persons articled to these clerks.

[1] 22 George II c. 46 § 14.

[2] Vol. i 262-264, 647-648. [3] Vol. x 511.

[4] The Solicitors' Act 1843, 6, 7 Victoria c. 73 § 46 provided that the rules for the admission of attornies and solicitors laid down by the Act should not apply to clerks of the Petty Bag Office, or the Clerks of the Queen's Coroner and Attorney in the court of Queen's Bench; this clause was repealed by the Solicitors' Act 1888, 51, 52 Victoria c. 65; therefore the only solicitors exempted from the ordinary rules as to admission are the solicitors of certain government departments, above 12.

[5] Above 53. [6] (1757) 1 Burr. 291.

had acted in sixty-three causes on behalf of prisoners. On proof of these facts the court ordered the articles to be cancelled. There were several cases in which attornies were ordered to be struck off the rolls because they had been guilty of unprofessional conduct, or because they had been guilty of criminal offences. Thus an attorney who had handed to a sheriff a list of the persons he wished to be summoned on a jury, and an attorney who signed the name of a fictitious barrister to a demurrer, were struck off the rolls.[1] In 1778 it was decided that an attorney convicted of and punished for theft, though he had suffered his punishment and had been guilty of no misconduct for the past four or five years, must be struck off the rolls. Lord Mansfield said, after consulting the judges, that to take such a step was not in the nature of a second punishment.

> It is on this principle; that he is an unfit person to practise as an attorney . . . the court on such cases exercise their discretion, whether a man whom they have formerly admitted is a proper person to be continued on the rolls or not.[2]

Similarly, the court could punish professional lapses by a fine. Thus an attorney who stated a fictitious case, in order to get the opinion of the court on a point of law, was fined £40 and imprisoned till the fine was paid.[3] The solicitors for the parties in the famous *Highwaymen's Case* (1725), in which one highwayman brought a suit for an account against another highwayman, were imprisoned and fined £50 each.[4] It was due to the efforts of the Society of Gentlemen Practisers that one of the solicitors in this case, by name Wreathock, who had subsequently been transported for robbery on the highway, and who, on his return, had been re-admitted as an attorney, was finally struck off the rolls.[5] In fact we shall see that the control exercised by the courts was made more efficacious than it could otherwise have been, by the manner in which the Society of Gentlemen Practisers brought cases of peccant attornies and solicitors before the courts.[6]

(ii) The courts supplemented the statutory rules by making rules as to the admission of attornies and solicitors, and as to their professional conduct. Thus in 1741 attornies were incapacitated from acting as bail in any case before the court,

[1] Christian, A Short History of Solicitors 164; for other instances see below 67; Lord Hardwicke treated this power to strike a solicitor off the rolls as well settled; he pointed out that, though it was anomalous, it was more difficult to deal with a barrister who was guilty of professional misconduct, Anon (1741) 2 Atk. at pp. 173-174.

[2] *Ex parte* Brounsall (1778) 2 Cowp. 829, at p. 830.

[3] In the Matter of R. J. Elsam (1824) 3 B. and C. 597.

[4] For the record in this case see L.Q.R. ix 197-199.

[5] Records of the Society viii-ix, 77-78, 82-83, 85.

[6] Below 67.

and in 1778 this rule was extended to their clerks.[1] In 1779 it was held that an attorney, who had been struck off the roll of attornies at his own request and called to the bar, could not be replaced on the roll till he had been disbarred by his Inn.[2] In 1791 the King's Bench and Common Pleas forbade an admitted attorney, who was acting as clerk to another attorney, to take an articled clerk; and ordered that the names of all candidates for admission as attornies, and the names of the attornies to whom they had been articled, must be posted for one term in the office of the court to which the application for admission was to be made.[3] The last-mentioned rule was found by the Society of Gentlemen Practisers to be useful, because it gave it the opportunity to make enquiries, and, where necessary, to oppose the admission of a candidate.[4] In 1793 Lord Kenyon warned attornies that, if they advised the prosecution of groundless or frivolous actions, they might be ordered to pay the costs.[5]

(iii) The Legislature had, as we have seen, done something to settle the relations of attornies and solicitors with their clients by laying down rules as to the presentment and taxation of their bills of costs.[6] The courts added to these rules by establishing the attorney's or solicitor's lien, that is the right of the attorney or solicitor to retain his client's documents till his costs are paid.[7] This lien had been recognized by the courts as early as 1688;[8] in the case of Taylor of Evesham in 1719, which Burrow said was the earliest instance of its recognition;[9] in a case of 1734 in which it had been allowed as against the assignees of a bankrupt client;[10] in two cases of 1740;[11] in a case of 1749;[12] and in another case which Lord Mansfield said that he had argued in the court of Chancery.[13] It was a right, Lord Mansfield said in 1779, which was not very ancient, but which was recognized as well established "on general principles

[1] Bologne v. Vautrin (1778) 2 Cowp. 828.

[2] *Ex parte* Cole 1 Dougl. 114. [3] Christian, op. cit. 167.

[4] The Society regularly scrutinized these lists, and if necessary entered a caveat against persons whom they thought ought not for any reason to be admitted, Records of the Society 191 (1805); for instances of caveats entered see ibid 176-177 (1801), 180-181 (1802); before this date the Society had regularly scrutinized the lists of persons admitted, ibid 22 (1746).

[5] Christian, op. cit. 168. [6] Above 55-56.

[7] This is the solicitor's retaining lien, to be distinguished from his common law lien on property recovered or preserved by his efforts, and his statutory lien enforceable by a charging order, Halsbury, Laws of England xxvi 814.

[8] Christian, op. cit. 166. [9] (1779) 1 Dougl. at pp. 104-105.

[10] *Ex parte* Bush 2 Eq. Cas. Ab. 109 pl. 4.

[11] Ibid 723 pl. 3 and 4; in the former case it was allowed to a clerk in court (vol. ix 370) employed by a solicitor.

[12] Turwin v. Gibson (1749) 3 Atk. 720.

[13] Wilkins v. Carmichael (1779) 1 Dougl. at pp. 104-105; this was the case of a maritime lien, and the statement as to the solicitor's lien was made *obiter* in the course of the argument.

of justice." He recognized also their common law lien. "Courts both of law and equity," he said, "have now carried it so far, that an attorney or solicitor may obtain an order to stop his client from receiving money recovered in a suit in which he has been employed for him, till his bill is paid." [1] On the other hand, both attornies and solicitors could be sued by their clients if they negligently managed their affairs, and they were also liable to be attached by the court in such cases.[2] Moreover, the court scrutinized with care bargains made by attornies and solicitors with their clients, and gifts made by clients to attornies and solicitors [3]—though at this period it was perhaps more ready to support such gifts than it is to-day.[4]

The judges in the eighteenth century, and even later, sometimes pressed hardly and even unfairly on attornies and solicitors.[5] No doubt they were led to act harshly by the bad cases brought before them, in which attornies and solicitors had cheated their clients, or had been guilty of other kinds of unprofessional conduct.[6] It was not difficult in the eighteenth century for black sheep to slip into the profession; for it was not difficult to evade the rules laid down by the Legislature. And in this matter the judges were not wholly free from blame. The Legislature in 1729 had contemplated a real examination by the judges into the fitness and capacity of candidates for admission to the profession.[7] But the judges contented themselves with a merely formal examination as to whether the requirements as to service under articles had been satisfied, and the necessary affidavits had been sworn. This fact is clear from the account which that clever rascal, Hickey, gives of his examination by Yates, J., the prospect of which had caused him needless alarm.[8] Hickey had been taken by his father to Yates's house, since Yates, a friend of his father's, had offered to admit him. He told Hickey to come to breakfast with him the next day, and in the meantime to send his articles and other necessary particulars to his clerk. Hickey says:

[1] For instances see Turwin v. Gibson (1749) 3 Atk. 720; Barnesley v. Powell (1750) Ambler 102.

[2] Floyd v. Waugh (1747) 3 Atk. at p. 568, *per* Lord Hardwicke; cp. Arnot v. Biscoe (1743) 1 Ves. Sen. 95.

[3] Walmesley v. Booth (1739) 2 Atk. 25; Saunderson v. Glass (1742) 2 Atk. 296.

[4] Oldham v. Hand (1751) 2 Ves. Sen. 259—a gift to an attorney after the cause was over was upheld; but see Hatch v. Hatch (1804) 9 Ves. at pp. 296-297, *per* Lord Eldon; Wright v. Carter [1903] 1 Ch. 27.

[5] Christian, op. cit. 159-162; Blackstone, Comm. iii 26 says of attornies that, "as they have many privileges on account of their attendance there [i.e. in the courts to which they are attached], so they are peculiarly subject to the censure and animadversion of the judges."

[6] Christian, op. cit. 162-163.

[7] Above 54.

[8] Memoirs of William Hickey i 331-332.

At the time appointed I attended and in a terrible fright I was at the ordeal I imagined I had to pass through, and the probable loss I might be at in answering some of the many questions I understood would be put to me upon points of practice. Being conducted into his parlour where the breakfast things were all arranged, in five minutes the judge entered. We sat down, and he recommended his French rolls and muffins as of the best sort, but so predominant were my fears about the dreaded examination that I had no inclination to eat. Breakfast being over, he asked me how I liked the Law, how long I had been out of my clerkship, and two or three other questions equally unimportant, when a servant entered to announce the carriage being at the door, whereupon he desired his clerk to be called, upon whose appearance he enquired whether Mr. Hickey's Certificate was ready. The clerk having it and other papers in his hand, the Judge took it from him, and after perusal subscribed his name, and then said, "Now, Mr. Hickey, if you will be so good as to accompany me to Westminster Hall, I will get you sworn, and the business concluded." I accordingly stepped into his coach which conveyed us to Westminster, and immediately going into court, where he had taken his seat upon the Bench, the proper officer was asked whether he had the roll, and answering in the affirmative my Certificate was delivered to him and read, as was also an affidavit of my master, Mr. Bayley's. This being done the Judge ordered the oaths to be administered to me, after which, and my subscribing my name to each, I was entered upon the Roll as an Attorney, and making a respectful bow to the Bench and Bar, I retired, most agreeably relieved from my apprehensions respecting the various interrogatories I had expected would be put to me on the subject of my qualifications.

Hickey's examination may have been more than usually perfunctory on account of the judge's friendship with his father. But if a scoundrel like Wreathock could, on his return from transportation, get re-admitted,[1] it looks as if the judges were satisfied with very perfunctory examinations as to the fitness and capacity of candidates for admission.

In fact, neither the rules made by the Legislature, nor the rules made by the courts, were by themselves sufficient to provide an effective organization and an effective discipline for this branch of the legal profession. They were not sufficient because there was no organized body whose business it was to see that the statutory rules were observed, and to set in motion the machinery of the courts. We shall now see that this need was supplied by the Society of Gentlemen Practisers in the Courts of Law and Equity. By the measures which it and its successor, the Law Society, took to enforce the statute law, to set in motion the powers of the courts, and in many other ways to further the interests of this branch of the legal profession, its status was raised, and it was rescued from that stigma of inferiority, which was attached to it in the eighteenth and early part of the nineteenth centuries.

[1] Above 59.

(2) *The Work of the Society of Gentlemen Practisers in the Courts of Law and Equity.*

The first minute in the records of this Society is dated February 13, 1739.[1] This may have been the first meeting of a new Society; and the resolution which it adopted as to general meetings, and as to the appointment and meetings of a committee, points in that direction. On the other hand, the fact that it had a steward would lead to the inference that the Society had been for some time in existence. Probably the Society had been formed at some time, but not a very long time, previous to 1739. It would seem that the Society "took its origin in friendly and convivial meetings of members," and that "out of these meetings a powerful Society gradually developed."[2] Its meetings never ceased to be convivial[3]—they were held at various taverns[4] till 1772; and from that time onwards they were held in the halls of Clifford's Inn or Furnival's Inn.[5] But, from the first, the Society at these meetings, and through its committee and officers, concerned itself with all matters which in any way affected its members; and we shall see that its opinions were treated with respect by the bar, by the bench, and by Parliament.[6] The records of the Society run from February 13, 1739, to February 23, 1832. They are contained in seven quarto volumes. Six of them, containing the records from 1739 to 1819, are in the possession of the Law Society; and the records from 1739 to 1810 have been printed and edited by Edwin Freshfield. The seventh volume containing the records from 1819 to 1832 has disappeared.[7]

It appears from the first minute of the Society that it held two general meetings a year, after the Hilary and Trinity terms;[8] and that its business was managed by a committee with power

[1] It runs as follows: "At a meeting of the Society of Gentlemen Practisers in the Courts of Law and Equity, held on the 13th February, 1739, the Meeting unanimously declared its utmost abhorrence of all male and unfair practice, and that it would do its utmost to detect and discountenance the same; and to that end it was agreed that a General Meeting be held twice a year, viz. on the next day after every Hillary and Trinity Term, unless such day happened to be on a Sunday, and then on the day following and that the Steward for the time being should appoint the place of such meeting, and that twenty-one members should be appointed to meet once a month, or oftener, if thought proper, to consider of such methods as might best answer the purposes aforesaid, who were to report the same and their opinion thereon at the next General Meeting, and that any five of them should be a sufficient Committee. That four stewards should be appointed for each half yearly meeting," Records 1.

[2] Ibid Introd. i. [3] Ibid xcvii.

[4] "The Society appears to have tried one after another the various taverns and coffee houses in the neighbourhood of the Temple. Among those named are the Crown and Anchor in St. Clements, the historical Old Devil Tavern, the Anchor and Baptist's Head, and the King's Head in Symon's Inn," ibid iii.

[5] Ibid; Gibson, Centenary Address to the Law Society 7.

[6] Below 68, 69, 72. [7] Gibson, op. cit. 4-5. [8] Above n. 1.

to act, which was to meet once a month or oftener.[1] This committee consisted of twenty-one members, which was increased two years later to twenty-four.[2] But the meetings of the committee were irregular. In 1800 the number of meetings was reduced to four a year; and the members were divided into rotas of six, who must attend in their turn or forfeit 5s. for each default.[3] The chairman of the general meeting was styled the Prolocutor, and was probably appointed by the meeting.[4] The Society had a secretary who summoned the meetings and kept the accounts. He had the help of a deputy or an assistant secretary.[5] There were also four stewards who were compelled to serve. Their duties were to look after the Society's dinners.[6] The amounts of the subscriptions to the Society were settled at the general meeting, and varied from time to time.[7] Between the years 1770 and 1780 the number of members, exclusive of the committee, was 129. Probably the number of members never exceeded 200.[8] This is a very small fraction of the total number of attornies and solicitors.[9] But, from 1786 onwards, its work was supplemented by the growth of provincial law societies formed to attain similar objects.[10] And, though its numbers were comparatively small, the respect with which, from the first, the Society was treated, shows that it must have included a large number of the leading members of the profession. At the end of the century the Society seems to have adopted the name of the Law Society; and in the latest of its minute books, now extant, which runs from March, 1810, to to February, 1819, "any other title than that of 'The Law Society' seems to have been completely abandoned, if not forgotten." [11]

In 1794-1795 an attorney, by name Joseph Day, proposed to establish by Act of Parliament a corporation of attornies and solicitors.[12] The corporation was to consist of the Lord Chancellor, the Judges, the Master of the Rolls, the Chief

[1] Gibson, op. cit. 4-5; the records show that from the first the committee took power to act.

[2] Records 5. [3] Ibid xcii-xciii, 173. [4] Ibid xciii.

[5] Ibid. [6] Ibid xciii-xciv. [7] Ibid xciv-xcv.

[8] Ibid xcvi. [9] Above 8 n. 3.

[10] "In 1786 a society had been formed in Yorkshire, another, ten years later, for Somersetshire; Leeds followed these examples in 1805, Plymouth in 1815, Gloucester in 1817, Birmingham and Hull in 1818; in the same year a similar association was founded in Kent," Christian, A Short History of Solicitors 176.

[11] Gibson, op. cit. 7-8.

[12] A full account of this scheme is contained in a book published by Day in 1796 entitled "An Address to Attorneys-at-Law and Solicitors practising in Great Britain and to the Public upon the proceedings of a Committee of the London Law Club relative to a Bill proposed to be presented to Parliament for incorporating and better regulation of the Practitioners"; it is a vindication of Day and an attack on his opponents.

Justice of Chester, the Law Officers, the Masters in Chancery, certain officials of the courts, and certain attornies and solicitors named in the Act. The Lord Chancellor was to be the first president of the corporation, and the Judges and the Master of the Rolls were to be its governors. The cursitor Baron, the Chief Justice of Chester, the Law Officers, and certain of the officers of the courts were to be the first Council. The attornies and solicitors named in the Act were to be its first members. The corporation was to elect examiners for the persons who were candidates for admission as attornies and solicitors; and these candidates were to be twice publicly examined in the presence of the Society. Each year the president and governors were to elect the council from those holding the offices held by those who were named councillors in the Act. The president was to be elected from amongst the governors. The president, governors, and council were to elect future members. The governors, council, and members could make bye-laws for the government of the society.[1] Day also suggested that a site should be bought which would give this new Society a permanent home. This proposal was approved by some of the judges and officials of the courts, and by a few attornies and solicitors. But Day from the start had made the mistake of ignoring the Law Society; and its opposition was fatal to the scheme. Nor is it difficult to see why the Law Society opposed it, and why some attornies, who had at first assented to it, withdrew their assent. The scheme would have put the entire control of this branch of the profession into the hands of the judges, the law officers, and certain officials of the courts; for it is clear that the powers reserved to the ordinary members of the Society were very small; and that they had no say at all as to the persons who were to be elected members. It is not surprising, therefore, that the Law Society opposed it, and that it took the view that it was better able to look after the interests of the profession than a corporation of this kind. Day was naturally indignant, and said hard things of the Law Society and of some of its members. But its committee showed some liberality to him, when they secured the payment to him of the expenses which he had incurred in the prosecution of his abortive scheme, and some reward for the expenditure of his time and trouble.

Day was right in thinking that some more formal organization of the profession, and the possession of a permanent home, were desirable; but the Law Society was right in opposing the scheme of organization which he put forward. At the end of the second

[1] For the heads of the bill see Day at pp. 199-204.

decade of the nineteenth century similar proposals were made by some of the members of the Law Society, which were not open to the objections which had been fatal to Day's scheme. In 1823 Bryan Home, and certain other members of the Society, set on foot a project for the formation of a "London Law Institution," which was to be composed of attornies, solicitors, and proctors resident in England and Wales, of the principal officers of the superior courts of record at Westminster, and of persons who had voluntarily withdrawn their names from the rolls of attornies and solicitors. A subscription was to be raised from the London attornies, solicitors, and proctors for the purchase of land and the erection of a building in Chancery Lane, and the members of this new Society were to pay an annual subscription.[1] The project was approved in 1825, the money was raised, and the present Law Society's Hall was built. The first meeting of the new Law Society was held in the hall in June 1831 ;[2] and in the same year the Society was incorporated by royal charter.[3] In 1832, as the result of conferences held with the old Law Society, the two Societies were amalgamated, and the records and papers of the old Society were handed over in 1834 to the new Society.[4] With the formation of the new Law Society we reach the last phase in the history of this branch of the profession. The history of its activities, and their effects upon the organization and discipline of the attornies and solicitors, will be related in a subsequent chapter.

We must now turn to the activities of the Society of Gentlemen Practisers. These activities can be grouped under the following heads: discipline; the safeguarding of the interests of its members; the promotion of reforms in the law; supervision of the relations between its members and the bar; other miscellaneous activities.

Discipline.

We have seen that, in the first minute in the records of the Society, it is declared that "the meeting unanimously declared its utmost abhorrence of all male and unfair practice, and that it would do its utmost to detect and discountenance the same."[5] It consistently acted up to this resolution; and it was due to its efforts that the law as to the admission of attornies was

[1] Gibson, Centenary Address 8-11. [2] Ibid 11.

[3] Ibid 12-13; the name given to it in the charter was "The Society of Attorneys, Solicitors, and Proctors and others not being barristers practising in the Courts of Law and Equity of the United Kingdom"; in 1837 it was resolved to call the Society "The Incorporated Law Society of the United Kingdom," and that title was generally used till 1903, when, by its supplemental charter, it became "The Law Society," ibid 15.

[4] Ibid 13-14. [5] Above 63 n. 1.

enforced, and that some sort of check upon the character of the persons admitted was maintained. Thus in 1742 :

> It was ordered that all proper and necessary enquiries be made by the Committee to discover any Attorneys or Solicitors who had been or should be surreptitiously admitted : that every member of the Society should use their utmost endeavours to discover and discountenance any such practice, and that the Committee should use such ways and means as they should find most necessary to prevent such practices in the future.[1]

Thus it objected to persons who had not regularly served their articles—for instance it objected to a man who had " acted as a writer for hire " while he was supposed to be serving his articles ; [2] and to a man who had kept a school in the country during that period, and had never been near his master's office.[3] In 1748 the committee were of opinion that further legislation was needed to prevent " broken tradesmen and other loose and disorderly persons " carrying on business as attornies or solicitors under cover of admitted attornies.[4] In 1752 the Society ordered its committee to prosecute at its expense attornies guilty of illegal practices.[5] In 1745 it took measures to get an attorney who had stood on the pillory, and had been struck off the roll of the court of Common Pleas, struck off the rolls of other courts.[6] We have seen that it got rid of Wreathock, who had been re-admitted as an attorney after having been concerned in *The Highwaymen's Case*, and after having been transported for robbery.[7] We have seen also that it regularly scrutinized the lists of persons admitted, and, after 1791, the lists of candidates for admission, and that it took action where necessary.[8]

The safeguarding the interests of its members.

Since the Society started out with the intention of maintaining the honour of this branch of the profession, and since it did all it could to fulfil that intention by getting rid of unworthy members, it is only natural that it should have been quick to resent any reflection upon its members. As early as 1741 " a resolution was passed that an application be made to

[1] Records 11 ; in 1744 this order was read, and it was referred to the Committee " to enquire whether any persons, and who, had been admitted Attorneys or Solicitors who were not duly qualified, and to report to the next General Meeting with their opinions thereon, what may be proper to be done to remove such persons from the office of Attorneys and Solicitors, and to prevent the admission of unqualified persons for the future," ibid 17.

[2] Ibid 21.

[3] Ibid 129, 131 ; cp. ibid 80—a motion to strike off the roll Greenwood and Sliper " on the ground that Sliper had surreptitiously procured himself to be admitted an Attorney under articles to the said Greenwood at a time when Sliper was footman or common servant to Greenwood."

[4] Ibid 30. [5] Ibid 51. [6] Ibid 19-20.

[7] Above 59. [8] Above 60.

leave out of the next Land Tax Act so much of it as incapacitated Attorneys and Solicitors from being Commissioners for executing the said Act." [1] In 1766 serjeant Davy, in the course of his address to a jury, had said that "out of the many mistakes in the management of causes 19 out of 20 happen by the ignorance of attorneys." The Society resolved that counsel who thus reflected upon attornies ought not to be employed by any of its members; and this procured a speedy apology from serjeant Davy.[2]

From the first the Society was not very favourable to the provisions of the Acts of Parliament which allowed the clerks in government offices to do work which it considered ought to have been done by its members. We have seen that it disliked the permission given to sworn clerks in Chancery, and to clerks articled to them, to become solicitors.[3] Similarly, its committee objected to clerks in the writ of error office "being concerned in prosecuting, defending, and soliciting writs of error." [4] The committee took into consideration a bill which was proposed in Parliament, to enable the clerks of the King's coroner and attorney in the King's Bench to be admitted as attorneys, but "they were of opinion that no effectual objection could be made to it." [5] This looks as if they would have liked to oppose it if they had thought that their opposition would have been effectual. At the beginning of the nineteenth century the Society protested against a regulation made by the Speaker of the House of Commons as to the conduct of private bills, which it was feared would transfer to the clerks of the House the work done by attornies and solicitors as Parliamentary agents; [6] and it got an assurance from the Speaker that no such transfer of functions was intended.[7]

It is not surprising, therefore, that the Society never hesitated to criticize any abuses in the offices of the courts which had come to the notice of its members, or any inconveniences which they had experienced in those offices. In 1750 it was informed that a Six Clerk had refused to sign a pleading, which was necessary in order that a defendant might dismiss an appeal for want of prosecution. The ground of his refusal was that the sworn clerk had not paid the Six Clerk his fees—though in fact these fees had been paid by the client to the sworn clerk.[8] The matter

[1] Records 6-7. [2] Ibid 114-115. [3] Above 57.

[4] Records 143; but the report was referred back by the general meeting for reconsideration, ibid 144.

[5] Ibid 212. [6] Ibid lxxxiv-xci. [7] Ibid 221-222.

[8] Ibid 42—it was said "that the said Six Clerks often insist on being paid by the parties in the cause or their Solicitors for their fees in respect of copies of pleadings which the sworn Clerk employed as Clerk in Court had refused or neglected to pay"—a serious allegation against the honesty of the sworn clerks, and a reflection on the way in which the Six Clerks controlled them.

was brought before the Lord Chancellor by petition ; and various counsel, including the solicitor-general, appeared for the petitioner gratis, "as the application was at the instance of the Society." The result was that the Six Clerk climbed down.[1] On several occasions the Society endeavoured to procure an alteration of the hours of attendance or the course of practice at some of the offices of the courts.[2] In 1776 complaint was made that the Masters in Chancery would not grant warrants to attend in the afternoon. But on this occasion the committee thought that no action should be taken, "as the Masters in Chancery attended longer in the morning than before, and several of them would grant warrants in the afternoon if desired, and as others were so infirm that they could not attend in the afternoon, especially in the winter season." [3]

At the end of the century the change in the value of money, and the new taxation imposed upon attornies and solicitors, raised the question of the adequacy of the fees which they were entitled to charge.[4] In 1798 the committee resolved that

> the present fees of attorneys and solicitors practising in the several courts of law and equity were founded on immemorial custom and usage only, and that as the present fees were established at an early period, upwards of a century ago, when the value of money was such as rendered the then allowance adequate to its purpose ; but that the personal and peculiar imposts laid on the practisers within the last few years, and other causes which occasion an immense increase of their capital, render an increase of their fees absolutely necessary.[5]

In the first instance it was resolved to approach the Lord Chancellor and the Master of the Rolls for an increase of the fees payable in the court of Chancery.[6] In 1805 it was resolved to approach the judges in order to get an increase of fees payable in the common law courts.[7] In 1807, during the chancellorship of Lord Erskine, the increase of fees payable in the court of Chancery was obtained. Addresses of thanks were sent to the Lord Chancellor and the Master of the Rolls,[8] and "it was resolved that 'Lord Erskine' be a standing toast at the Society's dinners, and that his health be drunk at general meetings." [9] The negotiation for an increase in the fees payable in the common law courts did not progress so satisfactorily. Though some increase was granted in 1810 it was not considered adequate by the Society.[10]

Perhaps the most signal service which the Society rendered

[1] Records 45.
[2] Ibid 118-120 (the Seal office) ; 130 (the clerk of the errors in the Exchequer Chamber) ; 141-143 (the practice of the clerks in the same office).
[3] Ibid 134.
[4] Ibid lxxviii-lxxxiv.
[5] Ibid 163-164.
[6] Ibid 164.
[7] Ibid 191.
[8] Ibid 201-202.
[9] Ibid 205.
[10] Ibid 227-228.

to the profession was the successful resistance which it offered to the attempt of the Scriveners' Company to compel all attornies and solicitors, who did conveyancing business in the City of London, to join the company.[1]

The Scriveners' Company was incorporated by royal charter in James I's reign.[2] One of the antecedents of the company was the mediæval association of writers of court hand.[3] Those members of this association who were more especially concerned with the production of books developed later into the Stationers' Company.[4] Those members who were more especially concerned with the drafting of legal documents developed into the Scriveners' Company.[5] In the sixteenth century the Scriveners' Association had become an association of men who were closely connected with both law and finance. They were closely connected with law because they drafted the documents needed to give effect to legal transactions. They were closely connected with finance because they advised their clients—landowners and traders—as to the lending and borrowing of money.[6] We have seen that all persons who practised as notaries belonged, and still belong, to it.[7] It had become a powerful association because, as Mr. Tawney says, "the humble amanuensis had developed into a specialist in certain branches of financial business."[8] "He becomes, in the first place, a skilled adviser who is consulted as to the financial standing of the parties to a bargain. . . . From being an adviser he becomes a financial middleman, handling the kind of business done to-day by a certain type of solicitor,"[9] and drafting the necessary documents. Naturally persons who wanted to invest money on loan left it with scriveners, who thus developed "a kind of anticipation of deposit banking."[10] But in the eighteenth century the importance of the scriveners had been declining. The bankers had taken their place as financial agents.[11] The attornies and solicitors had cut into their conveyancing business; and the country attornies and counsel had cut into their financial business.[12] It was probably for this reason that the company attempted to force attornies and solicitors, who did conveyancing business in the City of London, to become members of the

[1] Records xii-lxxii. [2] Ibid xii. [3] Ibid. [4] Vol. vi 362.
[5] Tawney's Introd. to Wilson's Discourse on Usury 97.
[6] Ibid 97-98. [7] Vol. v 115. [8] Tawney, op. cit. 98.
[9] Ibid. [10] Ibid 99.
[11] For the early history of banking in England see vol. viii 183-192.
[12] In the case of Willet v. Chambers (1778) 2 Cowp. at p. 816 Lord Mansfield said, "the business of conveyancing . . . as carried on in the country is this: where there is an attorney or counsel of credit, they receive money to place out upon securities; and the persons who want to borrow, as well as those who want to lend, apply to them for that purpose. . . . I remember a case before me of a person who was trusted to the amount of many thousand pounds in the manner I have stated."

company. As one of the witnesses for the defence in the trial of the action between the company and the attornies said, the real reason for this move on the part of the company was that it "was thrown into very great straights—and therefore must make use of this means to recover itself." [1]

In 1749 the first move was made by the company. It brought an action in the Mayor's court against Alexander, an attorney, for breach of a bye-law of the City of London made in 1712. The bye-law provided that no one who was not free of the City was to practice any art, trade, mystery, manual occupation, or handicraft in the City. Alexander, in consultation with the Law Society, conducted his own case. He disputed the jurisdiction of the Mayor's court to hear such an action against an attorney, and, in order to raise this question, got a writ of privilege from the King's Bench. The company moved to set aside the writ. The case was heard in 1750-1757; but no judgment was given, since it abated by the death of the chamberlain of the company.[2] The company then got the City to pass an Act to compel all persons doing the same business as Scriveners in the City of London to take up their freedom with the company.[3] In 1752 it began new actions against Alexander and other attornies, based, as before, on the bye-law of 1712.[4] The proceedings were conducted on behalf of the attornies by the Law Society. The same plea to the jurisdiction was put in; and in 1754 the King's Bench remitted the case to the Mayor's court, and the defendants were told to raise the question of privilege there by means of a demurrer.[5] This was done, and the recorder overruled the demurrer. There was appeal, and the ruling was upheld.[6] The company then called on the attornies in the City to take up their freedom. But the Law Society pointed out that the decision was only a decision as to the jurisdiction of the Mayor's court, and offered to defend actions brought against attornies.[7] The result was a series of actions brought by the company against the attornies, in one of which the jury found that conveyancing was not an art or mystery which fell within the bye-law, and judgment was given in 1760 for the attornies.[8]

The attornies and the solicitors in the City of London thus got the right to pursue their conveyancing business free from the control of the company. But the scriveners were still entitled to compete with them till 1804. In fact, it would seem that there was nothing to prevent persons without any

[1] Records 277. [2] Ibid xv. [3] Ibid. [4] Ibid xvi.
[5] Ibid. [6] Ibid. [7] Ibid.
[8] The report of the trial is printed in ibid 246-286.

legal qualifications from setting up as conveyancers.[1] It was to redress this evil that the Legislature in 1804 made conveyancing the monopoly of the legal profession.[2] We have seen that a little later the Inns of Court, at the instance of the Law Society,[3] made rules as to the issue of certificates to special pleaders and conveyancers, which were designed to remedy some unfortunate consequences which might otherwise have arisen from the provisions of the Act.[4]

The promotion of reforms in the law.

The Society was active in promoting reforms not only in the law relating to attornies and solicitors, but also in other branches of the law.

It is clear that many of the provisions of the statutes relating to attornies and solicitors[5] were suggested by the Society. Thus, in 1748, it suggested that attornies who sued out process should be obliged to furnish their addresses, or the addresses of their agents in London.[6] In the same year it suggested legislation to secure that articled clerks really served their masters during the period of their articles, and to suppress all unqualified persons who carried on business under cover of qualified attornies.[7] In 1753 it suggested the legislation against attornies who prosecuted or defended actions while in prison.[8] In 1778 and 1779 it was considering the law as to the affidavits to be made of the execution of articles, and of service under articles.[9] We have seen that it unsuccessfully opposed the permission given to the sworn clerks in Chancery to take articled pupils.[10]

From the first the Society was active in suggesting reforms in many different branches of the law. In 1740 a bill for regulating trials at *nisi prius*, and the more effective summoning of juries, was considered, and a deputation was appointed to help the members of the House of Commons who were settling the bill.[11] In 1742 a member of the House of Commons, who was preparing a bill for the more easy recovery of small debts, asked for the help of the Society's committee.[12] In 1747 the

[1] In 1802, " Mr. James, one of the members present, informed the Committee that since the last meeting a person acting as a conveyancer from his ignorance had made a mortgage in fee of a life estate; that another person in the country, acting also as a conveyancer, had advanced money of his client upon a bond taken without a stamp, from his ignorance, supposing that entering into the common printed form was sufficient to secure the money; and also that a person in Jersey, who was not admitted an attorney or solicitor, advertised by public hand bill to do business as a conveyancer at one-third less than the usual charges made by solicitors," Records 180.

[2] 44 George IV c. 98 § 14.
[3] Black Books of Lincoln's Inn iv 144.
[4] Above 26-27.
[5] Above 54-58.
[6] Records 28; above 53.
[7] Records 29-30; above 55.
[8] Records 65; above 54.
[9] Records 139, 140.
[10] Above 57.
[11] Records 2-3.
[12] Ibid 8.

Society was considering the statutes as to vexatious arrests, and suggesting amendments.[1] In 1754 and 1756 the Society was considering the principles applicable to the taxation of costs in proceedings in error.[2] In 1755 and 1756 it was considering an amendment of the law relating to fines and recoveries,[3] and in 1772 it was considering amendments in the law of bankruptcy.[4] In 1783 the committee was considering the large subject of the delay in, and the expense of, Chancery proceedings.[5] But in the following year the Society found the subject so complex that it gave it up.[6]

Supervision of the relations between the members of the Society and the bar.

The Society was always willing to intervene to settle differences which arose between the two branches of the profession; and there is no doubt that the settlement of those relations on their modern basis is due largely to its efforts. In 1748 it settled a dispute between an attorney, who was a member of the Society, and counsel, as to a retainer, in the course of which the attorney had been unjustly reflected upon, by the officiousness, counsel was careful to explain, of his clerk.[7] In 1822 it took up the question of the inconvenience caused by the absence of King's counsel retained in causes in the Lord Chancellor's and the Vice-Chancellor's courts.[8] The remonstrances of the Society had no immediate result;[9] but eventually the solicitors combined, and declared that they would give no brief to a King's counsel who did not confine himself to one court[10]—a step which inaugurated a system in the courts of Chancery, which survived the Judicature Acts, and has only recently disappeared. In 1763 it drew up a remonstrance against an order made by the benchers of the Inns of Court, that attornies and solicitors were not to be called to the bar until the lapse of two years from the time when they had ceased to practice;[11] and in 1764 the project of testing the validity of this order by writ of mandamus was mooted.[12] Perhaps the most important contribution made by the Society was its efforts to mark out the spheres of practice of the two branches of the profession. In 1760 it was considering how counsel and their clerks could

[1] Records 25. [2] Ibid 67, 75. [3] Ibid 74, 75.
[4] Ibid 125. [5] Ibid 155.
[6] "No plan having been laid before the Committee to proceed on, a motion was made and seconded that the said order and the subsequent orders in consequence thereof, be expunged out of the Society's minutes, which was ordered accordingly," ibid 157.
[7] Ibid 28-29, 32-33, 312-315. [8] Ibid ciii-cxiii.
[9] See ibid cxii-cxiii. [10] Christian, A Short History of Solicitors 220.
[11] Records 108, 110. [12] Ibid 111-112.

be prevented from transacting business which belonged properly to attornies and solicitors;[1] and in 1762 it came to the conclusion that "the most proper method to discountenance such practice was to prosecute every person so acting without being duly qualified, and that the Society ought to bear the expense of such prosecutions."[2] In 1802 it passed a resolution condemning the practice of conveyancers acting as solicitors.[3] In 1800 the Society approved a report of its Committee to the effect that certain counsel and conveyancers under the bar had "received clients and transacted business without the intervention of an attorney or solicitor," and that "such practices were highly improper and ought to be discountenanced by the Society and the profession at large."[4] We have seen that in 1846 the court of Queen's Bench laid it down that there was no binding rule of law which prevented a barrister from accepting a brief from a lay client.[5] But it should be noted that the court, though it approved of the practice that a barrister should not deal directly with the lay client,[6] refused to recognize it as a rule of law, mainly because it did not rest upon immemorial user.[7] Possibly it might have been prepared to have found that the user had a lawful origin, e.g. some lost order made by the judges,[8] if it had had before it the evidence from the records of the Society of its recognition in the eighteenth century.

Miscellaneous activities.

The Society was grateful to persons who assisted it in its work. It thanked a Mr. Felton who had written and circulated at his own expense a book entitled "Friendly Hints to Young Gentlemen who are or intend to be bound by Articles to Attornies or Solicitors";[9] and when he applied for some reward for this and other services which he had rendered to the Society, it voted him a sum of fifteen guineas.[10] It passed a vote of thanks to Charles Barton, the eminent conveyancer, because in his book on conveyancing he had "deprecated the practice of

[1] Records 101, 103. [2] Ibid 104. [3] Ibid 182-183. [4] Ibid 174.
[5] Bennett v. Hale (1846) 15 Q.B. 171; vol. vi 444.
[6] 15 Q.B. at p. 185.
[7] "If immemorial user be relied on, we must remember that serjeants counters and other counsel existed in England long before the time of Edward I; and there seems every reason to believe that they long continued to communicate directly with the parties," ibid at pp. 184-185, *per* Lord Campbell C.J.; and then he cited Chaucer and the practice of the serjeants going to St. Paul's to meet their clients, vol. ii 490.
[8] "This being a matter of procedure, the Judges of their own authority might, according to their view of what was fit, have laid down a general rule determining under what conditions and restrictions barristers should be permitted to plead before them, and have preaudience: but no such rule is to be found," 15 Q.B. at p. 183.
[9] Records 48. [10] Ibid 61, 62, 63.

conveyancers of assimilating with their own the business of the solicitor" ; [1] and to Pickering for his Cambridge edition of the statutes. In the latter case it subscribed for the edition and recommended it to its members.[2] It sometimes voted money to its members who had fallen on evil days ; [3] and in 1807 it was considering the project of establishing a fund for their relief and the relief of their widows and children.[4] In 1803

> Mr. Brace of the Temple (a member of the Society) communicated the Minutes of the proceedings of the Law Association at a General Meeting held on the 14th July instant, in the Inner Temple Hall, containing a plan for the formation of a Corps to be called " The Law Association," to serve at their own expense in case of an invasion of this country by the enemy, together with the resolutions of the General Meeting thereon : and it was resolved that the thanks of this Society be given to the Committee of the Law Association for their obliging communication, and that the Society assured the Committee that every exertion in their power would be most cheerfully made to second the wishes of the Law Association and render them effective.[5]

This eighteenth-century Society of Gentlemen Practisers did a great work in disciplining and organizing this branch of the legal profession. By the manner in which it insisted on high standards of professional conduct, it raised its tone and therefore its status. In fact, this survey of its activities, and the activities of its committee, shows us that it was doing on a small scale very much the same things as the present Law Society now does on a large scale, through its Council and the various committees of that Council.[6] Unless the ground had been prepared by its work during the eighteenth century, the present Law Society could not have emerged in the first quarter of the nineteenth century ; and, unless it had had the experience of the old Society behind it, it would not have been able to do the great work for this branch of the profession and for the law which it did in the nineteenth century, and is still doing to-day.

The Proctors.

In the eighteenth century the proctors were not regulated by the Legislature. It was not till 1813 that penalties were provided by Act of Parliament in cases where they allowed their names to be used by unqualified persons, or in cases where

[1] Records 180. [2] Ibid 103. [3] Ibid 193, 196.
[4] Ibid 205. [5] Ibid 189-190.
[6] This is obvious if we look at the names of some of the existing committees of the Council—the Discipline Committee, the Professional Purposes Committee, the Scale of Costs Committee, the Legal Procedure Committee, the Parliamentary Committee ; there was nothing in the eighteenth century to correspond to the Examination and the Legal Education Committees for reasons which I shall explain in the following section.

unqualified persons acted as proctors.[1] Nor had the proctors formed any such society as the "Gentlemen Practisers," which could exercise a domestic control over them. We have seen that it was not until the establishment of the new Law Society in 1825 that they were included in the Society which was destined to take the place of the old Society of Gentlemen Practisers.[2] They were regulated partly by an ordinance made by the archbishop of Canterbury in 1696, and partly by the courts in which they practised.

The ordinance of 1696[3] regulated the number of proctors, and the conditions upon which a person could become a proctor. It provided that the number of proctors should be thirty-four. The thirty-four senior proctors already appointed were to be full proctors: the rest were to be supernumerary proctors, and were to become full proctors as vacancies occurred in the thirty-four. The supernumerary proctors were not to take articled clerks; and even one of the thirty-four could not take an articled clerk unless he was of five years' standing. No proctor could take a second articled clerk until the first had served five years. In order to become a proctor, a clerk must have served a clerkship for seven years under articles, and he must know Latin; and, by rules made by the proctors of the Arches court and Prerogative courts, he must, unless this requirement was dispensed with by the judge, be over fourteen years of age and under eighteen, and must not have served as a paid writing clerk.[4] When the clerk had served his seven years articles he was admitted as a notary by a faculty from the archbishop of Canterbury. A certificate as to service under articles signed by three advocates and three proctors was then presented to the archbishop. The archbishop issued his fiat, and a commission was directed to the Dean of the Arches to admit the applicant as supernumerary proctor[5]—just as in the case of an advocate.[6]

Proctors, like attornies and solicitors,[7] could be punished by the courts before which they practised if they were guilty of unprofessional conduct. "This court" [the Prerogative court], said Sir John Nicholl,[8] "has considerable authority over its own practitioners and officers. This authority forms a part of the jurisdiction inherent in all courts, which they are bound to exercise for the protection of their suitors against imposition and extortion." Thus, although the powers of the ecclesiastical courts over costs was limited, since they had no power to decide

[1] 53 George III c. 127 §§ 8 and 9.
[2] Above 66.
[3] For this ordinance see Parlt. Papers 1826-1827 xx; Burn, Ecclesiastical Law (9th ed.), tit. *Proctor* I.
[4] Parlt. Papers 1844 xxxviii 453.
[5] Burn, op. cit. tit. *Proctor* I.
[6] Above 47.
[7] Above 53.
[8] Piddle v. Toller (1830) 3 Hagg. Ecc. at p. 286.

what was due or to enforce payment,[1] yet the court could refer a bill of costs to the registrar for examination ; [2] and, if the proctor was found guilty of any irregular conduct, it could punish the proctor by suspension or otherwise.[3] If he was suspended the court of King's Bench would not interfere by writ of mandamus to compel his restoration.[4] It refused to interfere partly because the position of proctor was rather an employment than an office,[5] and partly because the judges had disciplinary powers over the officers of their courts. Even if they had exercised these powers wrongly the court of King's Bench could not interfere, because they had jurisdiction to exercise these powers, " and in all cases where such judges keep within their bounds, no other court can correct their errors in proceedings." [6]

Having now dealt with the organization and discipline of the various classes of persons who composed the legal profession, we must now examine the manner in which they acquired their legal education.

The Education of the Lawyers

Legal education in the eighteenth century is a very melancholy topic. Neither at the Inns of Court nor in the Universities was there any effective teaching of law ; and it was not till the last years of that century that the Society of Gentlemen Practisers showed any interest in the subject. The law student was obliged to get his knowledge of law by means of undirected reading and discussion, and by attendance in chambers, in a law office, or in the courts. It was not until the fourth decade of the nineteenth century that we can see the first signs of reform in the steps taken by the solicitors to provide some legal education for those students who were intending to enter this branch of the profession ; [7] and then, as we might expect, this long period of neglect delayed the public and professional recognition of the importance of establishing for all lawyers a sound system of

[1] Piddle v. Toller (1830) 3 Hagg. Ecc. at p. 287.

[2] Ibid at pp. 287-288 ; as was there pointed out this examination helped the suitor because it enabled him to see whether he had a good case if he were sued at law for the costs. and it helped the judge of the ecclesiastical court if proceedings for extortion were brought against the proctor.

[3] Ibid at p. 298 ; for a case where a proctor was condemned to pay costs see Prentice v. Prentice (1820) 3 Phill. Ecc. 311 ; for a case where a proctor was condemned to pay costs and suspended see In the Goods of Lady Hatton Finch (1830) 3 Hagg. Ecc. 255.

[4] Mr. Leigh's Case (1691) 3 Mod. 332 ; S.C. Carth. 169, 3 Lev. 309, Skin. 290.

[5] 3 Mod. at p. 335 ; if it had been an office the court might have interfered, see R. v. Ward (1731) 2 Stra. 893, where it was held that principal registrar of the archbishop of York's court, who was entitled to execute his office by deputy, was entitled to a mandamus to admit his deputy.

[6] 3 Mod. at p. 335.

[7] Below 100.

legal education.[1] Though the nineteenth century was an age of law reform, legal education was almost the last thing to be reformed. That being so, it is not surprising that the attempt made by Blackstone, at the beginning of the second half of the eighteenth century, to call attention to its importance, failed to produce any immediate response in England;[2] and that this failure had some unfortunate effects upon the theory and the practice of the law and upon legal literature.[3] Blackstone's views produced, it is true, a more immediate response in America;[4] and when, in the middle of the nineteenth century, the need for establishing a system of legal education began to be generally recognized, lawyers and laymen at last began to appreciate the wisdom of the appeal which Blackstone had made in vain to his contemporaries.[5] I shall deal with the history of legal education during this period under the two following heads: (1) The decadence of legal education; and (2) Blackstone's attempt to revive legal education and its results.

(1) *The decadence of legal education.*

In the course of the eighteenth century the readings and moots formerly given by the Inns of Court disappeared, and the exercises, in which both students and barristers were obliged to take part, were either commuted for money payments or survived only as meaningless forms.[6] We have seen that at the Middle Temple the student's obligation to perform exercises, and his obligation of residence, could all be commuted for a money payment.[7] All that survived were certain exercises called "candle exercises," because they were performed after supper by candle light. These were commuted in 1773 for a payment of £3; and in 1776 the amounts payable in lieu of all exercises were fixed.[8] We have seen that at Lincoln's Inn the fact that the students were obliged to perform certain formal exercises at the bar table till 1856, was used by the bar to enable it (subject to an appeal to the benchers) to exercise some control over the persons called to the bar.[9] At the Inner Temple there is a long order as to students' exercises in 1712.[10] It appears

[1] Below 100-101. [2] Below 100. [3] Below 89-91.
[4] Below 99-100. [5] Below 98. [6] Vol. vi 488-489.
[7] Ibid 489; Master Worsley's Book 136, 210-212.
[8] Middle Temple Bench Book 95 n. 3; the order of 1776 ran as follows: "Vacation Commons and Exercises ordered henceforth to be disused, and in lieu thereof that a fine of 40s. be raised from each Student and from each Barrister, a fine of £10 to be received upon his being called to the Bar, and also that the usual fees of 12s. payable by Students performing Vacation exercises to the officers and servants be charged to each gents. account upon his being called to the Bar, or upon taking his certificate," ibid.
[9] Black Books iv *v*; above 19-20.
[10] Calendar of Inner Temple Records iii 431-432.

from the order that the rules relating to the performance of exercises had become technical and somewhat unjust.[1] These rules were altered, and new rules for their performance were made. But it would seem that the bar was not over eager to do its duty in hearing these exercises, since it was found necessary to provide that, in order that "it may not be in the power of the bar by their default to prevent the gentlemen under the bar from the benefit of this exercise," a tender of an exercise, unperformed by the default of the bar, was to count as an exercise duly performed.[2] It is obvious that in these circumstances the performance of exercises will soon become a mere form.[3] At Gray's Inn exercises were still performed by the students and heard by the barristers. But, from a statement made by the Bench in 1795, it looks as if these exercises had become an excuse for extravagant entertainment of the bar by the students. The Bench, at the instance of the bar, recommended that these entertainments should be discontinued.[4]

It is, I think, fairly clear that, before the end of the eighteenth century, the keeping of terms by the eating of dinners had become the only condition for a call to the bar,[5] and that the exercises, whether performed before the barristers or the benchers, had become the meaningless forms which they undoubtedly were in the first half of the nineteenth century. Campbell, writing at the beginning of the nineteenth century, said that the exercises consisted of "reading a few lines written down for you by the butler," [6] and that on call the ceremony consisted "in swearing some oaths against Popery and going through the form of a legal argument." [7] In 1854 Mr. Whateley, Q.C., told the Inns of Court commissioners that, at Lincoln's Inn, the exercises performed before the barristers "had dwindled away":

[1] "Whereas, according to the ancient usage of this House, those who have actually performed the exercise called the imparlance have sometimes been amerced for the nonperformance thereof, and also that those who do actually attend the performance of the said exercise are, for want of number, equally amerciable with those that are absent," etc., Calendar of Inner Temple Records iii 431; there is a similar order in 1736, ibid iv 323-324.

[2] Ibid iii 431-432; iv 324.

[3] In 1735 there is a record of the performance of the exercises, ibid iv 310; and in 1737-1738 a statement of the exercises which should be performed, but there is also a statement of the amerciaments incurred for nonperformance of their duties by students, barristers, and benchers, ibid 382; and there are entries of compositions paid for neglect of these duties by barristers and students, ibid 19, 57-58; and also for failing to read at an Inn of Chancery, ibid 17, 62, 139, 176.

[4] Pension Book ii 375.

[5] Thus Wynne, in his Strictures on the Lives and Characters of the most Eminent Lawyers, which was published in 1790, says, at p. 87, that "a stranger to legal habits and customs would be almost led to suppose, that the several cooks of the Societies possessed the same art that was in use amongst the Professors of Laputa, where every viand was impregnated with science, so that commons and cases were naturally digested together."

[6] Life of Lord Campbell i 134. [7] Ibid 191.

When I was a student I used to be marched up to the barristers' table with a paper in my hand, and I said, "I hold the widow—." The barrister made a bow and I went away; and the next man said, "I hold the widow shall not—," and the barrister made a bow and he went off; and that was the remnant of performing the exercises.[1]

The exercises performed at the benchers' table were of a precisely similar character—the widow did duty on both occasions. Bagehot's humorous account of these performances at Lincoln's Inn in 1850 was probably true also of the other Inns. He says: [2]

The process was then this: All the students dined in Hall during term, and the only attempt on the part of the Inn to test or augment our legal knowledge consisted in certain exercises, which we had to "keep," as it was called, in due rotation. Though it is so short a time ago, people now-a-days will hardly believe what those exercises were. A slip of paper was delivered to you, written in legible law stationer's hand, which you were to take up to the upper table where the Benchers sat, and read before them. The contents were generally not intelligible: the slip often began in the middle of a sentence, and by long copying and by no revision the text had become quite corrupt. The topic was, "Whether C. should have the widow's estate?" and it was said that if you pieced all the slips together you might make a connected argument for and against the widow. In old time, I suppose, there used to be a regular "moot," or debate, before the Benchers, in which the students took part, and in which the Benchers judged of their competency. . . . But in 1850 the trial "case" had dwindled down to the everlasting question, "Whether C. should have the widow's estate?" The animated debate had become a mechanical reading of copied bits of paper, which it was difficult to read without laughing. Indeed, the Benchers felt the farce, and wanted to expedite it. If you kept a grave countenance after you had read some six words, the senior Bencher would say, "Sir, that will do," and then the exercise was kept. But this favour was only given to those who showed due gravity. If you laughed you had to read the "slip" all through.

There were very few attempts in the eighteenth century to supply the place of the old readings and moots; and those attempts did not succeed. In 1753—the same year as Blackstone began his lectures on English law at Oxford [3]—the benchers of Gray's Inn,

taking into consideration the many difficultys that young gentlemen who are unassisted meet with in the course of their study of the Law, and being desirous as far as in them lyes to provide a remedy for this inconvenience and to promote a regular method of study for the students of this Society, do order that Danby Pickering Esq. a Barrister of this Society do read in the Hall 40 lectures at such times as the Benchers from time to time shall appoint, and that the sum of sixty pounds be paid to him for the same after compleating the said lectures, he subscribing this order as an evidence of his consent thereto.[4]

[1] Inns of Court Commission, Parlt. Papers 1854-1855 xviii 54.
[2] Literary Studies (Silver Library ed.) iii 252-253.
[3] Below 91.
[4] Pension Book ii 274.

In 1754 the benchers expressed their satisfaction with the lectures and paid the lecturer £20 extra "for a piece of plate as a mark of their esteem for his having so well discharged himself in his office of Reader." [1] In 1756 the number of lectures was reduced to twenty-five, but the pay remained the same.[2] But in 1760 the attendance was so bad that the benchers threatened to discontinue them; [3] and in 1769 they were discontinued.[4]

At the end of the eighteenth century two other attempts were made to provide lectures. The first of these attempts was made in 1796 by Mr. Nolan, a barrister of Lincoln's Inn. He pointed out [5] that, though the Universities had made some provision for educating their students in English law by means of lectures,[6] the Inns had made no such provision, and he suggested that a law lecturer to the Society should be appointed.

> Such an institution will not be an absolute innovation, as it will in some degree resemble the ancient one of Reader, which has now fallen into disuse. But as an alteration in the manners of the times and the discipline of the Inns of Court would render the revival of that office inefficacious, I venture . . . to propose that the office of Law Lecturer should be created under the following regulations.

The regulations, which are reminiscent of those established at Oxford for the Vinerian Chair,[7] provided for public lectures for which no fee was to be charged, an entire course on law and equity for which a fee was to be paid to the lecturer, who was otherwise unpaid. Nolan said that he had spent some time in planning such a course of lectures, and asked to be appointed lecturer. He was accordingly appointed. The second of these attempts was made by James Mackintosh in 1799. Encouraged by Nolan's example and by his appointment as lecturer by the benchers of Lincoln's Inn, he petitioned for leave to give a course of lectures on the Law of Nature and Nations.[8] This permission

[1] Pension Book ii 277. [2] Ibid 284. [3] Ibid 293-294.

[4] Ibid 309; Pickering was made a bencher in the same year, ibid, and became treasurer in 1770, ibid 312; in 1784 it was ordered that the MS. of his lectures should be sent to his nephew the Rev. Henry Poole, ibid 340; it would be interesting to see how the MS. compares with the MSS. of Blackstone's lectures, for which see below 747-750; for Pickering's edition of the statutes see vol. xi 306.

[5] Black Books of Lincoln's Inn iv 66-68.

[6] That is by the establishment of the Vinerian Professorship at Oxford in 1758, below 95, and the establishment of the Downing Professorship of the Laws of England at Cambridge in 1788.

[7] Below 94.

[8] "I observe by your proceedings in [Feb. 1796], that you then granted permission to Mr. Nolan to read Lectures on the Law of England in your Hall, from which I am led to suppose that you have formed a favourable opinion of legal lectures as a part of the education of students. It is far from my wish to intrude into the province of Mr. Nolan, for whom I have a high respect, and who I hope has not finally relinquished the prosecution of his useful plan. I have formed an idea of delivering a course of lectures on another subject closely connected with our Municipal Law, and forming the basis of the positive law of all states, I mean the Law of Nature and Nations," Black Books iv 77.

was not readily granted, since Mackintosh was suspect on account of his *Vindiciae Gallicae;* but, owing to the interposition of Lord Loughborough, it was eventually granted, and Lincoln's Inn Hall was filled with a numerous and distinguished audience.[1]

These courses of lectures, and one or two others which were given in the first half of the nineteenth century,[2] showed that opinion was beginning to be aroused by the neglect of the Inns of Court to provide any legal education for their students. But all these courses had a short life because they were not part of a well-considered scheme of legal education. No one was obliged to attend them; and, since the day of compulsory examinations was as yet distant, there was no inducement for the average student to incur this extra labour.

Nor was any better provision made for the education of those who intended to become attornies, solicitors, and proctors. They were supposed to be able to pick up some knowledge of law in their masters' offices during the period of their articles. It was not till 1807 that the Society of Gentlemen Practisers resolved, "that it would be expedient to establish a Society of the articled clerks to the Members of the Society for the purpose of discussing legal questions under the patronage and direction of the Society."[3] The Committee formulated a plan for the creation of such a society;[4] but nothing further was done.[5] We have seen that in Day's proposed scheme for the incorporation of attornies and solicitors, there were provisions for making the examination of candidates for admission to the profession more searching; but there was no provision for their education.[6] At some period, probably at the beginning of the nineteenth century, a more ambitious scheme was formulated.[7] There was to be a college of attornies and solicitors. The college was to be incorporated and was to consist of all members of the profession. It was to be governed by a president, two vice-presidents, a council, and a senate. The council, which was to be elected from amongst the members of the profession, was

[1] Campbell, Chancellors vi 288-290; Mackintosh delivered two courses of lectures ibid 290 n.

[2] In 1834 the Middle Temple discontinued the readership at New Inn, and substituted for it a lectureship for their students; Jardine held the post of lecturer from 1834 to 1846, Middle Temple Bench Book 104 n. 1; from 1833 to 1835 Starkie and John Austin lectured at the Inner Temple, but the lectures were discontinued owing to the small attendance, Commission on the Inns of Court, Parlt. Papers 1854-1855 xviii 144; in 1810 Joseph Chitty lectured on commercial law in Lincoln's Inn, Black Books iv 120-121.

[3] Records 201.

[4] Ibid 204, 205, 206.

[5] Ibid 207.

[6] Above 64-65.

[7] This scheme is printed in the Records of the Law Society 311-312; it is not connected with Day's scheme—the details are entirely different; the organization is different—much more power is given to the profession; while Day's scheme is mainly directed to discipline, this scheme is mainly directed to legal education; and there is no mention in Day's scheme of provincial councils.

to be divided into committees of common law, equity, conveyancing, and crown law. One member of each of these committees was to be appointed by the council to examine into the legal attainments, the character, and prospects of all candidates for admission into the profession. Similar councils, committees, and examiners were to be set up for each county and for all important towns; and they were to have the same powers as their brethren in London. The members of provincial councils were to have the power of attending London meetings; and they were to have the power to make bye-laws to regulate professional practice. It is not clear who formulated this scheme, or whether it was ever seriously considered. It is certain that nothing came of it.

We have seen that Doctors' Commons imposed a year of silence upon the newly admitted advocate, during which period he must attend the courts, in order that he might get a competent knowledge of their procedure.[1] But we have seen that Doctors' Commons, like the Serjeants' Inns, was never an educational body. The advocate must always be a Doctor of Law of Oxford and Cambridge.[2] Their education was therefore the affair of their University. At the beginning of the eighteenth century lectures were still given on the civil and canon law at Oxford and Cambridge;[3] but, by the middle of the century, both Universities had ceased to make provision for the effective education or examination of their students. At Oxford Thomas Bever in 1762 said that "the nominal students whose private convenience, or college statutes, oblige to wear the gown, are generally contented with a slender mechanical something, barely enough to entitle them to the honour and benefit of a degree."[4] The examinations for the degree of Bachelor of Arts required by the Laudian Statutes had become as farcical as the exercises performed by the students before the benchers of the Inns of Court;[5] and for the degree of Doctor of Civil Law there

[1] Above 47. [2] Above 47.

[3] Thomas Wood, writing in 1708, says, in his Thoughts Concerning the Study of the Laws of England in the Two Universities 4-5, that "in the Universities there are publick Professors of the Roman Law and Lectures read in the Schools upon some general Titles of it. And young men think themselves obliged to read an Institute of the Imperial Law, and a comment upon the Title De Regulis Juris, and then to study Grotius and Puffendorf. . . . The Canon Law is also read and practised within the Universities; and even Divines think themselves under a necessity to read the Institutes drawn up by Lancellot or Corvinus, and to consult the Decrees and Decretals with the chief Canonists for settling Cases of Conscience."

[4] A Discourse on the Study of Jurisprudence and the Civil Law 28; for Bever see below 644-645.

[5] Oxford University Commission Report, Parlt. Papers 1852 xxi 59—the commissioners cited a passage from the works of Vicesimus Knox i 377-380 to the following effect: "The poor young man to be examined in the sciences often knows no more of them than his bedmaker, and the masters who examine are sometimes equally unacquainted with such mysteries. But *schemes*, as they are called, or

was neither teaching nor examination. In 1852 Dr. Phillimore told the Oxford University commissioners that the total emoluments of the Regius Professor of Civil Law were under £100 a year, that his duties had become "of mere formal observance," and that all serious study of the civil law was discouraged.[1] The reason, he said, was this: [2]

> The members of the several colleges, the statutes of which exact degrees in civil law as essential qualifications for holding or retaining certain fellowships, have beyond memory of man been accustomed to obtain such degrees after a formal and commonplace examination, and so inveterate has been this practice, that they consider themselves in the enjoyment of a privilege which ought to liberate them from any severity of examination in this science.

Indeed the phrase "formal and commonplace examination" was a considerable understatement. The commissioners reported that "for the doctorate in the faculty of civil law and divinity 'wall lectures' as they are called suffice; that is the candidates are shut up in the Schools for an hour or two." [3]

At Cambridge conditions appear to have been much the same. Candidates for the degree of Bachelor of Law were required to attend the lectures of the Professor of Civil Law; [4] but, until the second half of the eighteenth century, these lectures had ceased to be given; [5] and the only exercise prescribed was an Act—"a public Latin disputation in the syllogistic form on two questions of law" [6]—which was quite insufficient to test the learning of the candidate.[7] Candidates for the degree of Doctor of Law were also supposed to attend the same non-existent lectures as the candidates for the degree of Bachelor; and therefore residence was necessary.[8] But, since no lectures were given, the requirement of residence was dispensed with; and the

little books, containing 40 or 50 questions in each science, are handed down from age to age from one to another. The candidate to be examined employs three or four days in learning these by heart, and the examiners having done the same before him when they were examined, know what questions to ask, and so all goes smoothly"; it should be added that the examiners were masters of arts chosen by the candidate.

[1] Oxford University Commission, Evidence 254. [2] Ibid 255.

[3] Oxford University Commission, Report 84.

[4] Cambridge University Commission 1852, Evidence 23.

[5] Ibid 77, Evidence of Sir H. Maine, the Regius Professor, who said that "the practice of lecturing appears to have been at one time altogether disused, but it has recently been so far revived that I myself, and my four immediate predecessors, have regularly delivered a course of lectures on Jurisprudence, in each of the three Academical Terms, on such days as seemed to us most convenient"; this would put back the beginning of these lectures to 1757.

[6] Ibid 78, Evidence of Sir H. Maine.

[7] "My immediate predecessor, Dr. James William Geldart (1814-1847), finding that the Act . . . was a very insufficient criterion of fitness for the degree, instituted . . . a regular series of terminal examinations, which he compelled every student in law to pass before permission was accorded to dispute in the schools," ibid.

[8] Ibid 25.

exercises required—two Acts and One Oppenency—could be dispensed with if the candidate was non-resident.[1]

Robert Lowe in 1854 told the Inns of Court Commission that the Inns of Court were then

> in the same position as the University of Oxford was at the end of the last century, when the University had virtually delegated the power of conferring a degree to the Colleges, the consequence of which was that the Colleges, whether from competition among themselves or having no sufficient motive, had brought the thing down to the very lowest point.[2]

Thus no better provision was made for the education of the civilians than was made for the students of English law. In both cases the bodies which were supposed to provide that education had ceased to provide it. The words which Roger North had used of the Inns of Court at the end of the seventeenth century, were, in the eighteenth century, equally applicable to the Universities—" there are societies which have the outward show or pretence of collegiate institution ; yet in reality nothing of that sort is now to be found in them." [3] In the eighteenth century the civil law was " as destitute of institution " as was the common law when North wrote.

The entire cessation of the public teaching of law left the student to educate himself as he could. Generally he followed more or less closely the programme sketched by North in his *Discourse on the Study of the Laws*—reading, commonplacing, attendance on the courts, discussion, and attendance at an office or in chambers.[4] Mr. Justice Foster tells us [5] that he heard the trials of Dammaree and Purchase in the students' gallery at the Old Bailey. He said that he mentioned that fact " for the sake of the students of the Inns of Court, who coming properly habited in students' gowns have a right to the use of

[1] Cambridge University Commission 1852, Evidence 25.

[2] Inns of Court Commission Parlt. Papers 1854-1855 xviii 135 ; Cambridge was not much better ; Lytton Strachey, Characters and Commentaries 47-48, quotes a letter from Gray, the poet, in which he says, " the spirit of laziness (the spirit of the place) begins to possess even me, that have so long declaimed against it. Yet it has not so prevailed, but that I feel that discontent with myself, that ennui, that ever accompanies it in its beginnings. Time will settle my conscience, time will reconcile my languid companion ; we shall smoke, we shall tipple, we shall doze together, we shall hear our little jokes, like other people, and our long stories. Brandy will finish what port began."

[3] Discourse on the Study of the Laws 1-2, cited vol. vi 489-490.

[4] For some account of these methods see vol. vi 494-498. Mr. J. D. Cowley, A Bibliography of Abridgments (S.S.) lxxvi, has pointed out that I was wrong when I ascribed, vol. vi 601, " An Alphabetical Disposition of all the Heads Necessary for a Perfect Commonplace " to Samuel Brewster of Lincoln's Inn. I should have said that he was the author of the notes in the Bodleian copy.

[5] Crown Law 214 and note ; cp. vol. vi 496-497 ; there was a students' box at the Guild-hall into which Pickwick's friends were put by Perker, Pickwick chap. xxxiv ; Holdsworth, Charles Dickens as a Legal Historian 14-17 ; and also in the court of King's Bench, Life of Lord Campbell i 70.

the middle gallery on the left hand of the court during the trials"; and he adds that "the officers who make money of the galleries have sometimes behaved with rudeness towards the students; but the Court upon complaint hath constantly done them justice." Philip Yorke, the future Lord Hardwicke, learned his law in the office of Charles Salkeld, a London solicitor in large practice and clerk of the papers in the court of King's Bench.[1] He resided at Charles Salkeld's house from 1706 till shortly before his call to the bar in 1715.[2] There he prosecuted his legal studies in the usual ways, of which evidence still remains "in the collection of note-books, and of rules, opinions, cases, and treatises transcribed in his hand."[3]

In fact this practice of reading in a solicitor's office seems then to have been a usual method of legal education. Salkeld had also in his office at this time three men who attained fame as lawyers—Jocelyn, Parker, and Strange.[4] Obviously, in an office of this kind there were opportunities for legal discussion amongst the students—but it was not all students who were so fortunate. In the latter part of the century the practice of reading as a pupil in the chambers of a conveyancer, a special pleader, or an equity draftsman, was superseding the practice of reading in an attorney's or a solicitor's office.[5] We have seen that Romilly, when he resolved to go to the bar, went into the chambers of Spranger, an equity draftsman.[6] Romilly says:[7]

> I was the only pupil he ever had and indeed his drawing business was hardly sufficient to give employment even to a single pupil. I did not, however, repent the step I had taken. I passed all my mornings and part of most of my evenings at his house. He had a very good library which I had the use of; he directed my reading; he explained what I did not understand; he removed many of the difficulties I met with.

Romilly also, while he was a pupil, made a commonplace book which, he said, had been of use to him throughout his life;[8] and he and three other students—Baynes, Holroyd, and Christian—formed a moot club. "One argued on each side as counsel, the other two acted the part of judges, and were obliged to give at length the reasons of their decisions."[9] Lord Mansfield,

[1] P. C. Yorke, Life of Lord Hardwicke i 53.
[2] Ibid 54. [3] Ibid 55; below 255-256.
[4] Ibid 54; Jocelyn became Lord Chancellor of Ireland, Parker, Chief Baron of the Exchequer, and Strange, Master of the Rolls.
[5] It is said that Buller J., who was a pupil in Ashurst's chambers in 1763, was the first to adopt the plan of reading with a special pleader, Townsend, Twelve Eminent Judges i 3; it soon became common; the author of a work entitled Deinology (below 425) published in 1789, says in his introduction, that students then went to a special pleader's chambers instead of to an attorney's office; see also Campbell, Lives of the Chief Justices ii 329; Oxford University Commission 1852, 197—evidence of Denison, the deputy Judge Advocate General.
[6] Memoirs i 33, cited vol. vi 498 n. 1. [7] Ibid. [8] Ibid.
[9] Ibid i 48-49, cited vol. vi 497 n. 5.

when he was a student, was a member of a similar club ;[1] and at the beginning of the nineteenth century Tidd's pupils formed both a moot club and a juridical society, which met once a week.[2] At the end of the century the practice of reading in the chambers of a special pleader, an equity draftsman, and a conveyancer was established.[3] The famous lawyer William Tidd, who practised as a special pleader for more than thirty years, numbered among his many pupils Denman, Lyndhurst, Cottenham, and Campbell.[4]

Lord Eldon's advice given to a student in 1807, who proposed to study for the Chancery bar, shows that the course of study was severely practical, exacting, and to a large extent solitary.[5] He approved of the suggestion that the student should read in common law chambers for a year with Abbott—the future Chief Justice of the King's Bench.

I know from long personal observation and experience, that the great defect of the Chancery Bar is its ignorance of common law and common law practice ; and, strange as it would seem, yet almost without exception it is, that gentlemen go to a Bar where they are to modify, qualify, and soften the rigour of the common law, with very little notions of its doctrines or practice. Whilst you are with Abbott find time to read Coke on Littleton again and again.[6] If it be toil and labour to you, and it will be so, think as I do when I am climbing up to Swyer or Westhill, that the world will be before you when the toil is over ; for so the law world will be, if you make yourself complete master of that book. At present lawyers are made good cheap, by learning law from Blackstone and less elegant compilers ; depend upon it men so bred will never be lawyers (though they may be barristers), whatever they call themselves. I read Coke on Littleton through when I was the other day out of office, and when I was a student I abridged it. To a Chancery man, the knowledge to be obtained from it is peculiarly useful in matter of titles. If you promise me to read this . . . I shall venture to hope that, at my recommendation, you will attack about half a dozen other very crabbed books, which our Westminster Hall lawyers never look at. Westminster Hall has its loungers as well as Bond Street.

[1] " He told the writer . . . that, while he was a student in the Temple, he and some other students had regular meetings to discuss legal questions ; that they prepared their arguments with great care ; and that he afterwards found many of them useful to him, not only at the bar, but upon the bench," C. Butler, Horae Juridicae Subsecivae, Works ii 219.

[2] Life of Lord Campbell i 138-139, 140.

[3] Above 86 n. 5. [4] D.N.B.

[5] Horace Twiss, Life of Eldon ii 51-52 ; in 1793 Kenyon gave very similar advice to a law student, see Townsend, Twelve Eminent Judges i 122.

[6] With this advice Charles Butler agreed ; he said, Reminiscences (4th ed.) i 62, that " he never yet has met with a person, thoroughly conversant in the law of real property, who did not think with him,—that *he* is the best lawyer, and will succeed best in his profession, who best understands Coke upon Littleton " ; Butler in this paper recommends the student of real property, in addition to attending a pleader's and a conveyancer's office and the courts, to study a most formidable list of books.

Above all it was necessary to become a good conveyancer :

You must labour at it till you can speak and dictate conveyances of every species, and this can only be learnt by going through the drudgery of copying. I wrote some folio books of conveyances, and I strongly advise you to do the same.

It was only by becoming master in the art of conveyancing that it was possible to understand the decisions of the court of Chancery :

The conveyancing precedents have been formed and modelled so as to make all their provisions square with the rules of law, as modified by decisions in Equity.

It was necessary of course to learn to draw equity pleadings ; and for some time it was also necessary to go the spring and summer circuits. That practice helped to keep up a knowledge of the common law, which would, in its turn, improve the students' knowledge of equity.

On the recommendation of great men now no more, I followed it, till it became injustice to my equity clients.

It was by these methods that the law student educated himself in the eighteenth and early nineteenth centuries. Since its most salient feature was service in an office under articles or otherwise, or in chambers, or attendance in the courts, the student acquired a severely practical knowledge of the law from the angle of the pleader and the conveyancer.[1] Whether or not he gained any knowledge of legal principle depended partly on his own abilities and industry, and partly on the capacity and willingness of his master to teach him. And even if, by his own abilities and industry, and with the help of his master, the budding barrister or attorney attained some knowledge of legal principle, his legal knowledge was very insular ; for it was a knowledge only of the principles of English law. The civilians, it is true, were obliged to study the civil and canon law, and to know some English law in addition. But they were few in number as compared with the purely English lawyers, whose knowledge was confined to their own system of law, and whose education was so defective that it was comparatively few who were more than merely practitioners.[2] It was

[1] As Denison told the Oxford University Commissioners in 1852, Evidence 197, this method of legal education directed the student's attention merely to the machinery of the law—" he has attained some familiarity with the routine of certain branches of practical detail ; he has become a handicraftsman more or less dextrous ; he has stored his memory or his commonplace book, with a multitude of modern cases and precedents ; but he has yet to learn the science of the law " ; for the similar criticism made by Blackstone in the eighteenth century see below 97.

[2] As Denison said, Oxford University Commission 1852, Evidence 197-198, " is it to be wondered at that with such an education as this the English bar have, as a body, the reputation of being grievously deficient as jurists, while they are

no wonder that Philip Yorke in his student days called the study of English law "a crabbed barbarous study that has the greatest tendency to make a man unmannerly." [1] Though a certain number of students through their own industry and ability made themselves competent English lawyers, it was very few who were anything more. Men like Hardwicke, Mansfield, and Blackstone were the most distinguished of these exceptional men who proved the rule. This was the immediate consequence of the disappearance of any efficient system of legal education. In addition it had other unfortunate effects upon the law and its administration.

In the first place, we shall see that it gave rise to the idea, which has had a very long life, that systematic teaching of English law was useless, if not positively harmful.[2] In the second place, the difficulties of the student were aggravated by the fact that it caused a deterioration in the literature of English law. Busy practitioners, although they may be learned lawyers, are not so well fitted to write great law books as teachers of law who have necessarily devoted their time to a systematic study of its principles.[3] The books from which the student was obliged, in the absence of lectures, to get his legal knowledge were not very good practitioners' books and were very inadequate students' books.[4] With the exception of Blackstone's Commentaries, the position in the middle of the nineteenth century was much the same as it was in the eighteenth century. Dicey, speaking in 1909, said:

> Most of the works which fifty or sixty years ago were recommended to the attention of young gentlemen reading for the Bar, displayed little of logical power and really nothing of literary lucidity. A well-known treatise on the Law of Contract, usually placed in the hands of students at least as late as 1860, did not attempt to analyse the nature of a contract and left on the mind of an ingenuous reader the impression that somehow or other at the very centre of the whole law of contract lay the fourth and seventeenth sections of the Statute of Frauds.[5]

In the third place, since the only persons who studied the law were persons who intended to become practitioners, since the

eminently skilful as mere legal mechanics? That with some few bright exceptions, our law libraries contain nothing of English growth but reports, indices, and compilations, while America furnishes us with works of depth and comprehension."

[1] P. C. Yorke, Life of Hardwicke i 55. [3] Below 100-101.

[2] T. E. Holland, in a paper on Legal Education in a University, written in 1884, said, "after dealing with some hundreds of questions arising in actual practice, the student became aware that there were what he called 'classes of cases,' which he grouped in a rough and ready way for his own needs. In after-life he very probably perpetuated his rough and ready classification in a text-book"; we have seen, above 88 n. 2, that in 1854 it could be said that the American text-books were superior to ours—a phenomenon which was due to fact that they were ahead of us in devising a system of legal education, below 100.

[4] Below 99 and n. 4.

[5] Blackstone's Commentaries, Camb. Law Journal iv 304.

Inns of Court had ceased to attract students who did not intend to live by means of the law,[1] the study of English law ceased to be part of a liberal education. This made English law a very esoteric body of knowledge. Maine once remarked upon the singularity of the fact that in England "law belongs as much to the class of exclusively professional subjects as the practice of anatomy."[2] It was not so in the fifteenth, sixteenth, and seventeenth centuries, when the Inns of Court were a real legal University.[3] And though there is some truth in Maine's view that this phenomenon is due to the fact that English law was "a traditional customary law,"[4] I cannot doubt that it was due at least as much to the total abeyance of any public teaching of law in the eighteenth and the first half of the nineteenth centuries. In the fourth place, this absence of any system of legal education had some very unfortunate effects upon the government of the state and upon the administration of the law. It was indeed a curious paradox that in a state in which the working of the constitution depended upon the law,[5] a state in which the country gentlemen who sat in the House of Commons were legislators, and the peers were legislators and judges, a state in which the administration of the local government and of large parts of criminal law was entrusted to unpaid amateurs,[6] no provision should be made for training in the rudiments of law the persons on whom these duties were cast.[7] Though some members of Parliament and peers, some of the justices of the peace, and some of the unpaid amateur officials through whom they worked, took the trouble to study the law which they administered,[8] the majority did not; and a large number of the justices of the peace were wholly dependent upon a professional adviser, who was often a very uneducated attorney.[9] We have seen that in the sphere of local government this absence of legal education had, at the end of the century, some very unfortunate results. Though in sparsely populated rural districts, where the justices were always landowners in close touch with the rural population, and sometimes educated men, this

[1] This is clear from what Thomas Wood said in 1708 in his Thoughts Concerning the Study of the Law of England in the Two Universities 3, cited below 419 n. 3.

[2] "A very simple experiment, a very few questions asked after crossing the Channel, will convince you that Frenchmen, Swiss, and Germans of a very humble order have a fair practical knowledge of the law which regulates their everyday life. We in Great Britain and Ireland are altogether singular in our tacit conviction that law belongs as much to the class of exclusively professional subjects as the practice of anatomy," Village Communities 59-60.

[3] Vol. ii 510; vol. iv 267-268; Shakespeare's familiarity with legal terms is well known, see Underhill's Chapter on the Law in Shakespeare's England; and cp. L.Q.R. xxxii 350, xxxiii 6-8.

[4] Village Communities 60. [5] Vol. x 645-646. [6] Ibid 153, 163, 241.

[7] For Blackstone's criticism of this state of affairs see below 96.

[8] Vol. x 145-146. [9] Ibid 230.

system was tolerable,[1] it broke down in crowded urban districts where none but "trading justices" could be found to do the work.[2]

Very few lawyers realized these evil effects of the absence of legal education. One of them was Thomas Wood, a writer of books for students, whose work was praised by Blackstone.[3] He, like Viner,[4] advocated the teaching of law at the Universities. Another of these lawyers was Sir William Murray, the future Lord Mansfield—the greatest lawyer of this century. He had perceived in Blackstone, then a prominent fellow of All Souls, the makings of a great teacher. In 1752 he had recommended the duke of Newcastle to appoint him to the chair of Roman law in Oxford University which was then vacant. The duke, not being sufficiently sure of Blackstone's political support, fortunately refused to appoint him.[5] Fortunately, because Murray then induced Blackstone to start the public teaching of English law at Oxford. Though Blackstone's attempt to establish a system of legal education then failed,[6] it has had some very important effects. It showed up the evils of the absence of a system of legal education in a manner which assisted the reformers of the nineteenth century;[7] it helped to introduce in America, more quickly than in this country, the public teaching of law;[8] and it gave to the students of English law what they had long needed—a book of Institutes, of such merit that it became at once a legal classic both in England and America.[9]

(2) *Blackstone's attempt to revive legal education and its results.*

It was on November 6, 1753, that Blackstone gave his first lecture on English law at Oxford[10]—the first lecture on English law that had ever been given at a university. The new venture met, Blackstone himself tells us, with a favourable reception.[11] Bentham, though he denounced Blackstone as "a formal, precise, and affected lecturer," admitted that his lectures were

[1] Vol. x 138. [2] Ibid 143. [3] Below 419. [4] Below 93.

[5] Holliday, Life of Mansfield 88-89; Foss, Judges viii 246; below 705.

[6] Below 96; Robert Chambers, his successor as Vinerian Professor, was a distinguished lawyer and a friend of Dr. Johnson, see MacKinnon, The Murder in the Temple 79-80; but as he became a judge in India he could not do much for legal education at Oxford and in England.

[7] Below 100; Blackstone's plea for the study of English law at the University was cited in 1852 by the Oxford University Commissioners in their Report, in support of their recommendation that the school of Jurisprudence and History should be encouraged, Report 76-78.

[8] Below 100. [9] Below 712, 716.

[10] For the prospectus issued by Blackstone see App. IV (1); for the advertisement and time-table of his lectures for the year 1759-1760 see App. IV (3); for an account of Blackstone and his Commentaries see below 702 seqq.

[11] Preface to his Analysis of the Law.

popular, that he attracted from thirty to fifty students, and that his successor failed to draw such large audiences as he drew.[1] But, in order to prepare these lectures, Blackstone found it advisable " to mark out a plan of the laws of England, so comprehensive, as that every title might be reduced under some one or other of its general heads, which the student might afterwards pursue to any degree of minuteness; and at the same time so contracted, that the gentleman might with tolerable application contemplate and understand the whole." [2] This plan he eventually published under the title of *An Analysis of the Laws of England.* It owes most, he tells us, to Hale's analysis; [3] but it was by no means a copy. It was, in fact, an original scheme. This Analysis of the Laws of England Blackstone used as the syllabus of his lectures—a syllabus which, as he said, " is interspersed with a few definitions and general rules, to assist the recollection of such gentlemen as have formerly honoured him with their attendance, or such as may hereafter become his auditors." [4] After the publication of the lectures in the form of the Commentaries, later editions of the Analysis were accommodated to the new form which the lectures had taken. From the start, therefore, Blackstone systematically planned his lectures. He gave them as a private lecturer from 1753 to 1758. In 1758 he was made the first Vinerian Professor of English law, and thereafter he gave substantially the same course of lectures as Professor.[5]

Of Viner and his Abridgment I shall speak in the following section of this chapter.[6] Here it will be sufficient to say that, subject to certain legacies, he left all his property to Oxford University, including all the copies of his Abridgment, on trust for sale, and on trust to apply the money to the foundation of a professorship of English law, and of fellowships or scholarships for students of English law. He also left all his law books to the Radcliffe library, " for the use of such students as shall be inclined to have recourse to them." [7] It has been conjectured

[1] Works x 45.

[2] Preface to his Analysis of the Law; for some account of the MSS. of Blackstone's lectures see below 747-750; App. IV (4).

[3] For Hale's Analysis see vol. vi 590-591.

[4] Preface to his Analysis of the Law.

[5] That the lectures were substantially the same can be seen from this fact: Viner's bequest involved the election of Vinerian scholars as well as a Vinerian professor, and these scholars were obliged to attend the Vinerian professor's lectures; Blackstone tried (without success) to get the University to release from this obligation those Vinerian scholars who had attended the lectures which he had given as a private lecturer, Papers relating to the benefaction of the late Charles Viner, Bodleian Library, Gough 96 Oxford, hereinafter referred to as Papers, etc.

[6] Below 163-168.

[7] For the relevant parts of Viner's will see App. I (1); the books which came to the Radcliffe library under this bequest number 551, and are a good representative law library of the period; there came also to the University thirty-eight MSS.

that it was owing to the success of Blackstone's lectures that Viner conceived the idea of leaving his money to found a professorship of the common law at Oxford.[1] But this conjecture is without foundation. Viner had conceived this idea, and had made a will to give effect to it on July 1, 1752—more than eleven months before Blackstone had advertised, and more than sixteen months before he had given, his first lecture. This will and two other wills made in the same year were cancelled after a correspondence with Dr. William King, the Jacobite principal of St. Mary's Hall;[2] and the bequest assumed its final form in a will dated December 29, 1755. Viner had determined to leave his money in this way, not because of the success of Blackstone's lectures, but because, as Blackstone pointed out, he saw that the teaching of English law at a university was the best way to facilitate the great object of his life—the promotion of the study of that law.[3] The standard of teaching at the University was, it is true, at a low ebb; but it had not, as at the Inns of Court, wholly disappeared. In fact, the terms of Viner's will[4] show that this was the reason for and the object aimed at by his bequest. He wished

> that young gentlemen who shall be students there, and shall intend to apply themselves to the study of the common laws of England, may be instructed and enabled to pursue their studies to their best advantage afterwards, when they shall attend the courts at Westminster, and not to trifle away their time there in hearing what they understand nothing of, and thereupon perhaps direct their thoughts from the law to their pleasures.

With this object in view, a professor, fellows, and scholars were to be endowed; and a sum of money was to be raised for the continuation of the Abridgment. The scholars were to be junior members of the University of at least two years' standing,

which are chiefly collections of cases, etc., for the Abridgment; the catalogue of books and MSS. can be seen in the Bodleian handlist.

[1] This is stated by J. Holliday, Life of Mansfield 89, and is copied by Campbell, Lives of the Chief Justices ii 379; Dr. Blake Odgers, 27 Yale Law Journal 607, is sceptical—and rightly so.

[2] University Archives. The correspondence is printed in Papers, etc., but the name of Viner's correspondent is suppressed. King had been educated at Salisbury, and this may have led to his acquaintance with Viner, who was born there, below 164.

[3] "From a thorough conviction of this truth our munificent benefactor Mr. Viner, having employed above half a century in amassing materials for new modelling and rendering more commodious the rude study of the laws of the land, consigned both the plan and execution of these his public spirited designs to the wisdom of his parent University. Resolving to dedicate his learned labours 'to the benefit of posterity and the perpetual service of his country' (Pref. to vol. 18 of the Abridgment) he was sensible he could not perform his resolution in a better and more effectual manner, than by extending to the youth of this place those assistances of which he so well remembered and so heartily regretted the want," Comm. Introd. i 27-28.

[4] App. I (1).

and the fellows, masters of arts or bachelors of civil law. Both were to be attached to the college or hall selected by Convocation. The fellows were to teach the scholars, who were normally in course of time to become fellows; and the professor was normally to be chosen from the fellows. The election of the professor, fellows, and scholars was to be made by Convocation. Thus, a complete scheme was outlined for introducing for the first time into the studies of the University the subject of the common law of England. And so keen was Viner upon its establishment that it would seem that he somewhat neglected the claims of his aged wife, who died five years after him in 1761. At any rate, the Delegates appointed by Convocation recommended that the professor should supplement Viner's bequests to her by the payment of £50 a year from his stipend during her life.[1]

Within a year and a half of Viner's death his estate was wound up, and the University appointed Delegates of Convocation to draw up a scheme to give effect to his intentions.[2] The scheme which they proposed was in substance as follows:[3] In the first place a professorship was to be established with a salary of £200 a year. The professor was to be at least an M.A. or a B.C.L. of ten years' standing, and a barrister of four years' standing; and he was to be elected by Convocation. He or his deputy was to read one solemn law lecture on the laws of England in English on a stated day in each full term, and a complete course of sixty lectures on the laws of England throughout the year. For this course of lectures he could charge a fee to all students except the Vinerian scholars, who were to be obliged to attend two courses before they took their degree. The old Convocation-house and the room over it were to be fitted up as a school of municipal law. The fellows were to be paid £50, and the scholars £30 a year. They were to be elected by Convocation, and were to hold office for ten years. Former scholars were to have the preference in the election to fellowships. Fellows and scholars were to continue to be members of their respective colleges or halls, unless it was found practicable (which it was not) to "appropriate some particular college or hall for their reception."[4]

[1] University Archives, Papers, etc., section 6 of the Resolution of the Delegates. Viner left his wife his household goods, £50 in cash, an annuity of £50 a year, and a copyhold estate worth £30 a year.

[2] Bl. Comm. i 28, note. [3] Papers, etc.

[4] Viner had wished to establish his professor, fellows, and scholars in a college; but Dr. King dissuaded him, on the ground that "the established fellows will always refuse to admit the new ones to the same privileges and emoluments with themselves, and in that case your fellows will only be taken as Exhibitioners." He therefore recommended a hall, which might be made a college of the common law, as Trinity Hall, Cambridge, is for the civil law. Hart Hall, his own hall, he

Within six months of the appointment of the delegates their scheme was approved by Convocation—July 3, 1758.[1] Blackstone was elected first professor by Convocation on October 20, 1758.[2] On the following day he issued notices as to the dates of his inaugural lecture and his course of sixty lectures.[3] On the same day two Vinerian scholars were elected; and in 1761 the state of the fund was found to be sufficient to allow the election of a fellow.[4] Blackstone was thus justified in saying that the scheme was carried into execution with "unexampled dispatch." But cranks were as common in the University in the eighteenth as in subsequent centuries; and so the scheme was not carried into execution without opposition, and without the familiar accompaniment of numerous tracts.[5] On this occasion the opposition was unusually factious, as was shown by a masterly paper which was probably written by Blackstone.[6] But it would seem that for some years after the opposition tried to revenge itself by a petty persecution of Blackstone.[7] Blackstone was not the most even-tempered of men; and in July 1761 he issued a paper in which he complained of "the series of peevish opposition and personal insult which he has met with in the execution of his present employment."[8]

said was impossible, as it was "a college of priests only." He therefore advised Viner to leave it to Convocation to make choice of a hall, Papers, etc. Clitherow, Blackstone's brother-in-law, and the editor of his reports, says (1 W. Bl. xvii-xviii) that Blackstone wished to unite the professorship with the headship of one of the smaller colleges or halls, and so make the college or hall a school of English law; but that a clause in the scheme proposed by the delegates to carry this object into effect was negatived by Convocation.

[1] Bl. Comm. i 28 note.

[2] Ibid. Dr. Blake Odgers, 27 Yale Law Journal 607, has confused the mode of election directed in 1758 with the present mode directed in 1867 and 1877 on the refoundation of the chair.

[3] App. IV (2). For the advertisement and time-table of his course of lectures issued in 1759-1760 see App. IV (3). [4] Bl. Comm. i 28 note.

[5] Papers, etc.; Gibbon says, Autobiographies of Edward Gibbon, Memoir F 93-94, that "this judicious institution was coldly entertained by the graver Doctors who complained—I have heard the complaint—that it would take the young people from their books."

[6] "An examination of the objections to the Resolutions of the Delegates of Convocation for settling the benefaction of the late Charles Viner Esqre," Papers, etc. See also a skilfully-drawn paper which contains in juxtaposition the clauses of Viner's will, the Resolutions of the Delegates of Convocation, and the statutes founded thereon, ibid.

[7] Thus Blackstone had announced on October 21, 1758, that he proposed to read a general introductory lecture in the history school on Wednesday, October 25; but Wednesday, October 25, was not the first Monday in full term prescribed by the statute for the solemn lecture. Blackstone was for that reason charged with arbitrarily changing the date fixed by the statute, and was obliged to issue a paper explaining that his lecture on the 25th was "a supernumerary public lecture by way of general introduction to the course which he is engaged on." We have seen that Convocation refused to comply with his request to dispense those Vinerian scholars with attendance on his course, who had already attended his lectures given before he became professor, above 92 n. 5.

[8] The letter was called forth by objections raised to his appointment of deputies to read his solemn lectures.

It was in his inaugural lecture [1] that Blackstone described the condition to which legal education had sunk, suggested the manner in which the teaching of law ought to be revived, gave reasons for assenting to Viner's views that that education could be best conducted at a university, and indicated some of the advantages which might be expected to follow from a revival of an adequate system of legal education. Blackstone's arguments can be summarized as follows :

He began by asserting "the undeniable position" that "a competent knowledge of the laws of that society in which we live is the proper accomplishment of every gentleman and scholar." [2] But since "the long and universal neglect of this study, with us in England, seems to call in question the truth of this evident position," [3] he proceeded to give reasons to support it: The British constitution, and the liberties which it guarantees, depend upon the law, so that, since all are interested in the preservation of that constitution and those liberties, all ought to know something of the laws upon which it depends.[4] More especially ought all to know something of the laws which immediately concern themselves. The landed gentry ought to know something of the law which relates to their estates; for this knowledge would enable them to check the dealings of their agents, and "preserve them at least from very gross and notorious imposition." [5] All persons ought to know something of the forms required for making wills. "Those who have attended the courts of justice are the best witnesses of the confusion and distresses that are occasioned in families" for want of this knowledge.[6] All who have to serve as jurors, as justices of the peace, and especially those who aspire to become members of the House of Commons, ought to have some knowledge of law.[7] "Indeed, it is perfectly amazing that there should be no other state of life, no other occupation, art, or science, in which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any." [8] Such education is especially necessary for the nobility, who are "not only by birth hereditary counsellors of the crown, and judges upon their honour of the lives of their brother peers, but also arbiters of the property of all their fellow-subjects, and that in the last resort." [9] Moreover, a knowledge of English law is essential to the clergy,[10] to the civilians, the jurisdiction of whose courts is determined by

[1] For the advertisement of this lecture see App. IV (2).
[2] Comm. i 5-6. [3] Ibid 6. [4] Ibid.
[5] Ibid 7. [6] Ibid 7. [7] Ibid 8-9.
[8] Ibid 9. [9] Ibid 11. [10] Ibid 13-14.

English law,[1] and even to the physicians.[2] But if this knowledge is thus essential to all classes where else can it be better taught than at a university? The Inns of Court and Chancery, which were once a university for the teaching of English law, have ceased to be in any sense a teaching university.[3] It is therefore necessary that Oxford should step into the breach and begin to teach English law.[4]

> To those who can doubt the propriety of its reception among us (if any such there be) we may return an answer in their own way, that ethics are confessedly a branch of academical learning; and Aristotle himself has said, speaking of the laws of his own country, that jurisprudence, or the knowledge of those laws, is the principal and most perfect branch of ethics.[5]

It was the want of some teaching in English law which had given rise to the pernicious but prevalent idea that a liberal education was useless to law students, and that the only way in which students could be taught law was to place them "at the desk of some skilful attorney, in order to initiate them early in all the depths of practice, and render them more dextrous in the mechanical part of business."[6] No doubt some great lawyers had emerged in spite of this handicap; but it was worthy of note that, at that time, the four highest judicial offices were held by men who had had a university education.[7] Generally it was true to say that

> a lawyer thus educated to the bar, in subservience to attorneys and solicitors, will find that he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: *ita lex scripta est* is the utmost his knowledge will arrive at; he must never aspire to form, and seldom expect to comprehend, any arguments drawn *a priori* from the spirit of the laws and the natural foundations of justice.[8]

The best corrective to these erroneous ideas as to the legal education of students was the institution of a course of instruction in legal principles, such as only a university could give.[9]

[1] Comm. i 14-16; in this connection Blackstone pointed out that the statutes of Oxford and Cambridge Universities enacted that "one of the three questions to be annually discussed at the Act by the jurist-inceptors shall relate to the common law."

[2] Ibid 14; the only legal topic with which physicians should be acquainted was, according to Blackstone, the law as to the execution of wills; the topic of forensic medicine had not yet made its appearance.

[3] Ibid 25-26. [4] Ibid 26-27. [5] Ibid 27. [6] Ibid 32.

[7] Lord Northington and Willes C.J. had been fellows of All Souls, Lord Mansfield C.J. a student of Christ Church, and Sewell M.R. a fellow of Trinity College Cambridge, ibid n. *m*.

[8] Ibid 32. [9] Ibid 33.

And it should be noted that the course of instruction which Blackstone considered that a professor of English law at a university should adopt, is remarkable for its insight into essential qualities which it is now generally admitted that an academic education in English law should possess. Such a professor, he said,[1]

should consider his course as a general map of the law, marking out the shape of the country, its connexions and boundaries, its greater divisions and principal cities: it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet. His attention should be engaged, like that of the readers in Fortescue's inns of chancery, "in tracing out the originals and as it were the elements of the law." . . . These originals should be traced to their fountains as well as our distance will permit; to the customs of the Britons and Germans, as recorded by Caesar and Tacitus; to the codes of the northern nations on the continent, and more especially to those of our own Saxon princes; to the rules of the Roman law either left here in the days of Papinian,[2] or imported by Vacarius and his followers;[3] but above all, to that inexhaustible reservoir of feudal antiquities and learning the feudal law, or, as Spelman has entitled it, the law of nations in our western orb.[4] These primary rules and fundamental principles should be weighed and compared with the precepts of the law of nature, and the practice of other countries; should be explained by reasons, illustrated by examples, and confirmed by undoubted authorities; their history should be deduced, their changes and revolutions observed, and it should be shown how far they are connected with or have at any time been affected by, the civil transactions of the kingdom.

Blackstone explains the advantages which would flow from such a system of legal education to the law student and to the law. It was to the advantage of the law student to begin his study of law at a university, and make that study a part of his university education. Like Doddéridge[5] and North[6] in the preceding century, he pointed out the advantages which the lawyer would derive from a grounding in cognate studies:

Sciences are of a social disposition, and flourish best in the neighbourhood of each other: nor is there any branch of learning but may be helped and improved by assistances drawn from other arts.[7]

Indeed the present methods by which a law student studied his law were not only inefficient but dangerous.

A raw and unexperienced youth, in the most dangerous season of life, is transplanted on a sudden into the midst of allurements to pleasure, without any restraint or check but what his own prudence can suggest;

[1] Comm. i 35-36.
[2] Blackstone was wrong in thinking that any direct influence of this kind can be traced, vol. ii 12-14.
[3] See ibid 147-149.
[4] For the Libri Feudorum see ibid 142; for Spelman and his influence see vol. v 19-20, 404.
[5] Ibid 397. [6] Vol. vi 494. [7] Comm. i 33.

with no public direction in what course to pursue his inquiries; no private assistance to remove the distresses and difficulties which will always embarrass a beginner. In this situation he is expected to sequester himself from the world, and by a tedious lonely process to extract the theory of law from a mass of undigested learning; or else by an assiduous attendance on the courts to pick up theory and practice together, sufficient to qualify him for the ordinary run of business. How little therefore is it to be wondered at . . . that so many persons of moderate capacity confuse themselves at first setting out, and continue ever dark and puzzled during the remainder of their lives! [1]

All these inconveniences would be obviated if the student studied his law at a university, where he could get both instruction and discipline.[2] Such a system of legal education would also benefit the law. The teacher of law must concentrate his attention on legal principles, and he is able to examine those principles critically. Thus he is able to suggest useful reforms in the law.

The leisure and abilities of the learned in those retirements might either suggest expedients, or execute those dictated by wiser heads, for improving its methods, retrenching its superfluities, and reconciling the little contrarieties, which the practice of many centuries will necessarily create in any human system: a task which those, who are deeply employed in business and the more active scenes of the profession, can hardly condescend to engage in.[3]

Blackstone does not mention that other service to the law, which was to be so strikingly illustrated when he published his Commentaries—the improvement in its literature, which the books written by men who have devoted their lives to teaching law have effected, whenever an adequate system of legal education has been established.[4]

I have set out Blackstone's views as to the objects at which a system of legal education should aim, as to the evils which flowed from its absence, and as to the advantages which should follow from its introduction, because all his views have been proved, in the latter half of the nineteenth and in the present century, to be correct. But we have seen that in England in the eighteenth century and much later his advice was almost unheeded. In America it produced a more speedy response.

[1] Comm. i 31. [2] Ibid 26, 32-33. [3] Ibid 30.

[4] Dicey, Blackstone's Commentaries, Camb. Law Journal iv 303-304, said: "Of law books for the guidance of practitioners there existed of course in 1850 . . . a large number of treatises of varying worth or worthlessness. Of text books which should lay down for the guidance of intelligent readers the elementary principles governing each department of law there were few, or none of any eminent merit. Such works when rising to any high degree of excellence have in most countries been the fruit of professorial lectures. The lack of good text books probably resulted from the failure of our universities to take part in the teaching of law;" that Dicey is right is shown by the fact that, because America introduced sooner than England the university teaching of law, it produced law books which, in the middle of the nineteenth century, were superior to the English books of that period, above 88 n. 2; below 100.

Before the end of the eighteenth century his plea for the introduction of the university teaching of English law had resulted in the establishment or projected establishment of five university professorships of English law;[1] and his Commentaries were taken as a model of what university lectures on law should be.[2] The Harvard Law School was established in 1817;[3] and, with the appointment of Joseph Story as Dane professor, it soon became the leading law school of the country, and an example to other universities.[4] Law was taught as a science, and thus, as Blackstone had prophesied, it "was mastered with a facility and readiness, and in a spirit of sound philosophy to which a student in his private clerkship is almost totally a stranger."[5] We have seen that in 1852 American legal literature could be held up as a model to English lawyers.[6] Thayer was quite correct when he said that "we transplanted an English root, and nurtured and developed it, while at home it was suffered to languish and died down";[7] and the reason which he gave for this phenomenon was also correct.

> The conservatism of a powerful profession . . . untrained in the learned or scientific study of the law, and unconscious of the need of such training, did not yield to or much consider the suggestion of what had been already done at Oxford. The old method of office apprenticeship was not broken up.[8]

It was not till the fourth decade of the nineteenth century that there was any sign of the introduction of a permanent system of legal education. The first steps were taken by the Law Society. In 1833 it established courses of lectures for articled clerks on common law, equity, and conveyancing;[9] and in 1836, on its petition, the judges made a rule of court providing for the examination of candidates for the solicitors' profession.[10] But a long time elapsed before the need for systematic legal education, followed by examinations, was generally recognized. It is true that the majority of the witnesses, who gave evidence to the Inns of Court commissioners, approved of the system of

[1] Holdsworth, Some Lessons from our Legal History 175-176: "As early as 1777 Ezra Stiles, President of Yale, drafted the earliest plan for an American professorship of law. In 1779 a professorship of law was founded by Thomas Jefferson at William and Mary College, of which George Wyth was the first holder; and in the previous year Isaac Royall left money to Harvard to found a professorship of law. In 1790 James Wilson was appointed professor at the University of Pennsylvania. In 1793 Kent was elected Professor at King's College, Columbia."

[2] Ibid 176. [3] Ibid 177. [4] Ibid.

[5] Centennial History of the Harvard Law School 14.

[6] Above 88 n. 2; cp. Ames, Lectures on Legal History, 365, who agrees with Dicey on this matter, above 99 n. 4; Holdsworth, Some Lessons from our Legal History 186-191.

[7] Harv. Law Rev. ix 170. [8] Ibid 171-172.

[9] Inns of Court Commission, Parlt. Papers 1854-1855 xviii 127.

[10] Presidential Address, Centenary of the Law Society, 17-18; for the petition see the Inns of Court Commission 1854-1855, 287-288.

lectures and examinations which the Inns of Court, following the lead of the Law Society, were instituting. But the approval was not universal ;[1] and no less a lawyer than Cairns regarded them as of quite secondary importance, compared with training in chambers.[2] In 1858 Bowen described his initiation into the study of the law, in words which are strongly reminiscent of the description given by Blackstone of the generally received idea as to the proper training of a law student, exactly a century earlier.[3] In 1883 Dicey said in his inaugural lecture :

> If the question whether English law can be taught at the universities could be submitted in the form of a case to a body of eminent counsel, there is no doubt whatever as to what would be their answer. They would reply with unanimity and without hesitation that English law must be learned and cannot be taught, and that the only places where it can be learned are the law courts and chambers.[4]

So long lived was the heresy which Blackstone had denounced. Its long life was due to the length of time during which no provision had been made for the systematic teaching of English law.

We must now turn from the legal profession to the main sources (apart from the statutes) from which it derived its knowledge of the law.

II

The Reports, Abridgments, Dictionaries, and Indices

I shall, in the first place, say something of the Reports of the eighteenth century. In the second place, I shall say something of the Abridgments. In the third place, I shall deal with a class of books which are closely allied to the Abridgments—Law Dictionaries and Indices.

[1] Inns of Court Commission 1854-1855 40-41—evidence of Sir Fitz-Roy Kelly; 54—evidence of Mr. Whateley ; 71—evidence of Mr. Whitehurst.

[2] Ibid 137-138.

[3] " I well recollect the dreary days with which my own experience of the law began in the chambers of a once famous Lincoln's Inn conveyancer ; the gloom of a London atmosphere without, the whitewashed misery of the pupils' room within—both rendered more emphatic by what appeared to be the hopeless dinginess of the occupations of the inhabitants. There stood all our dismal text books in rows—the endless Acts of Parliament, the cases and the authorities, the piles of forms and of precedents—calculated to extinguish all desire of knowledge even in the most thirsty souls. To use the language of the sacred text, it seemed a dry and barren land in which no water was. And, with all this, no adequate method of study, no sound and intelligent principle upon which to collect and to assort our information," Address to the Birmingham Law Students' Society, 1888, cited Cunningham, Life of Lord Bowen 76-77 ; for Blackstone's description see above 97 ; cp. the evidence given by Denison to the Oxford University Commission in 1852, cited above 88 n. 1.

[4] Inaugural Lecture 1.

The Reports

We have seen that at the end of the preceding century the quality of the reports had improved ; [1] that though some reports were published from imperfect manuscripts and were carelessly edited,[2] more were prepared for the press and published by the authors who made them ; [3] and that those authors were often eminent lawyers.[4] Though the eighteenth-century reports are of varying quality,[5] we shall see that this improvement was on the whole maintained ; [6] and that, at the end of the century, there is a marked improvement in the technique of reporting.[7] But, for the greater part of the century, the conditions under which the reports were made and published were much the same as those which prevailed in the latter half of the seventeenth century. The lawyers made collections of cases, sometimes for their own use only, which were published after their death, or they made collections of cases with a view to publication, which they edited and published, often at a date considerably later than that at which the cases had been decided.

So long as this system prevailed, it was inevitable that the reporters should continue occasionally to insert notes of their own upon happenings in court, or upon other matters which they considered to be relevant or interesting. Thus, at the end of the case of *Millar v. Taylor*, Burrow inserts a long note upon the invention of printing and its introduction into England.[8] He tells us that in the case of *Millar v. Taylor*, Yates, J., took nearly three hours to deliver his judgment,[9] and that in the case of *Perrin v. Blake* the judges "were above five hours in delivering their opinions." [10] At the end of his fourth volume he inserts a note as to the great number of cases brought before the court of King's Bench, and the ability and celerity with which they were despatched.[11] Douglas interrupts his reports to give an account of the Gordon riots, and the burning of Lord Mansfield's house ; [12] and in the case of *Land v. North* [13] he gives an account of a curious happening in court during the hearing of the case. Some water, which had been thrown by a housemaid on to the skylight of the court, fell into the court and caused a panic. Every one—judges and counsel—thought the roof was falling in, and there

[1] Vol. vi 555, 559. [2] Ibid 557-558. [3] Ibid 559-563.
[4] Ibid ; and for Saunders' Reports see ibid 567-571.
[5] Below 145. [6] Below 130 seqq. [7] Below 110, 111-114.
[8] 4 Burr. 2410-2417—a note, he tells us, occasioned by the fact that, in a former report of the case, he inserted an erroneous note on this topic.
[9] Ibid at p. 2354. [10] Ibid at p. 2582.
[11] Ibid at pp. 2583-2584 : below 503.
[12] 1 Dougl. at pp. 435-437. [13] (1785) 4 Dougl. at p. 273.

was a mad scramble for safety.[1] Order was soon restored, and "Lord Mansfield then addressing himself to Mr. Wood and the Bar in general told them, if they had any wits left, they might go on."

But certain important differences were beginning to emerge between the reports of this, and the reports of the preceding period; and, at the end of the period, we see the beginnings of a change which will revolutionize the conditions under which reports are made and published. That change is the introduction of the modern system under which reports are made and published as soon as possible after the decision of the cases. I shall deal, first, with the differences between the reports of this and the preceding period. Secondly, I shall give lists of the reports of this period. Thirdly, I shall say something of some of the eighteenth-century reports and reporters. Lastly, I shall say something of the effects of the development of law reporting upon the establishment of the modern theory as to the authority of decided cases.

(1) *The differences between the reports of this and the preceding period.*

These differences can be summed up under the following heads: (i) the extension to other courts of the practice of reporting cases in the common law courts; (ii) the beginnings of separate series of reports; (iii) the style of the reports and the rules of law reporting; and (iv) the beginning of the regular publication of contemporaneous reports.

(i) *The extension to other courts of the practice of reporting cases in the common law courts.*

We have seen that in the preceding period the Chancery lawyers had begun to follow the lead of the common lawyers, and produce reports of cases decided in the court of Chancery.[2] In this period a considerable number of reports of cases decided in the court of Chancery were published;[3] and we have seen that in some of these collections cases of earlier periods are

[1] "Mr. Justice Willes got out by the private door on his side of the court. Lord Mansfield, Mr. Justice Ashhurst, and Mr. Justice Buller left the court with great precipitation by the usual entrance, and retired into the Lord Chancellor's private room. The bar, the bystanders, all present to the number of near two hundred (except about eight or ten) rushed out of court with the utmost precipitation. The barristers pressed towards the curtain, which being down very much impeded their escape. Entangled with this and their gowns, the greatest part of them fell, with those from other parts of the court one over another on the steps into the Hall"; possibly the panic may have been caused by a recollection of the accident at Worcester in 1757 when the roof of the court fell in, and killed several persons, below 480.

[2] Vol. vi 616-619.

[3] Below 124-125.

included.[1] As the century goes on, the series of Chancery reports grows fuller and more accurate; and we shall see that, in some cases, the deficiencies of some of the earlier reports in this series have been to a large extent remedied by the labours of later editors.[2] At the end of the century other courts had begun to follow the example of the court of Chancery.

We have seen that Sir Bartholomew Shower's publication of reports of cases in the House of Lords in 1698 had displeased the House; that it had ordered that no reports of its proceedings should be published; and that it had voted that such publication was a breach of privilege.[3] It was not till 1784 that Brown published a collection of cases decided in the House of Lords between the years 1702 and 1801.[4] Brown arranged his cases chronologically; but in a second edition he grouped them under subjects arranged in alphabetical order [5]—a curious and not very convenient reversion to an older method of arranging a book of reports,[6] which the practice of publishing contemporaneous reports of the decisions of the courts necessarily rendered entirely obsolete.[7] Brown's volumes were followed in 1789 by a small volume of House of Lords cases decided between the years 1697 and 1713, edited by Richard Colles.[8] None of these reports give any of the speeches of the Lords, and therefore none of their reasons for allowing or dismissing an appeal. They record only the formal decision to allow or to dismiss, so that the reasons must be deduced from the statements of facts, the arguments of the successful party, and, when they were consulted by the House, the opinions of the judges.[9] It was not till the publication of Dow's reports, which began the series of authorized House of Lords reports,[10] and contained cases between 1812 and

[1] Vol. vi 617-619. [2] Below 145.

[3] Vol. vi 572-573; Hardwicke made some difficulties as to the inclusion by Foster J. of a House of Lords case in his reports; but Foster pointed out that such cases were included in their collections by such reporters as Peere Williams, Strange, and Comyns, Michael Dodson, Life of Foster 45-46, 48.

[4] Wallace, The Reporters 413-414.

[5] Tomlins, who edited the second edition after Brown's death, tells us in his Preface that "the arrangement of the present edition was planned and prepared for the press by Mr. Brown himself, and the first three volumes were printed during the lifetime of that gentleman."

[6] Vol. vi 555. [7] Below 116. [8] Wallace, op. cit. 413.

[9] Brown, in the Preface to his first edition, thus describes his reports: "A fair and full report, not merely an abridgment of the whole case, collected from the state of each party, with a particular attention to dates, and as little variation from the language of the original cases as could possibly be avoided in connecting the historical facts of both. The printed reasons on each side thrown into the form of an argument; the names of the counsel who signed the cases inserted in the margin at the beginning of each argument; and in stating the decree appealed from, if in the court of Chancery, the name of the Chancellor who made it, which is very frequently omitted in the cases themselves. The final determination of the case as it appears in the Journals of the House, with a correct reference to the volume and page of those Journals."

[10] For the authorized reports see below 117.

1818, that the reasons of the Lords began to be reported.[1] Probably it was less possible to report profitably the reasons of the Lords when all the Lords took part in the decision, and not merely those learned in the law. It became more possible as the convention grew up that the House should be guided by the reasons given by its legal members.[2]

In 1798 we begin to get a regular series of the reports of the cases decided in the court of Admiralty. The reports were made by Christopher Robinson—a distinguished civilian and afterwards a judge of the court of Admiralty.[3] In 1801 a report was published of some of the cases decided in the court of Admiralty by Sir George Hay [4] and Sir James Marriott [5] between the years 1776 and 1779. In 1905 a collection of Prize cases, taken from existing reports and from notes of cases in text-books, between the years 1745 and 1859, was edited by E. S. Roscoe. The reason for the publication of the first two of these sets of reports was in part political. The decisions of the court, more especially in Prize cases, often had an international significance; and it was thought desirable to publish the reasons for these decisions, in order to justify the policy of the government, and to prove its desire to do justice to neutrals and belligerents.[6] We have seen that the civilians of Doctors' Commons, who practised as advocates and judges, were a small close body.[7] In the absence of reports the principles upon which these courts acted were mysterious both to English and to foreign lawyers. There was, in fact, some justification for their comparison of the civilians "to the Talmudists among the Jews who only dealt in oral traditions and secret writings";[8] for, as Mr. Roscoe has

[1] Dow said in the Preface to his reports that they form "perhaps the first instance, as far as concerns the decisions of the House of Lords, in which a detailed view has been attempted to be given of the judicial speeches or observations explaining the grounds and principles upon which these decisions rest."

[2] Vol. i 376-377; vol. x 610.

[3] Below 145.

[4] Below 672-674.

[5] Below 674-676.

[6] It was said in the Preface to Hay and Marriott's decisions at p. ii that Robinson's reports would help "to convince the world that the government of Great Britain has done and does justice in the fullest and most open manner to neutrals in war, as well as to its own subjects," and that "the printing of these decisions was at the desire and expense of Government"; it was said at p. iv that foreigners had got the notion that the judgments of the court of Admiralty were according to the common law, that "the court was but the little finger of the first lord commissioner of the Admiralty, and that the judge himself was removeable at his nod"; Robinson said in his Preface that "the honour and interest of our own country are too deeply and extensively involved in its administration of the Law of Nations, not to render it highly proper to be known here at home, in what manner and upon what principles its tribunals administer that species of law: and to foreign states and their subjects, whose commercial concerns are every day discussed and decided in those courts, it is surely not less expedient that such information should be given."

[7] Above 50.

[8] "It has long been complained that there are no public reports of decisions in the court of Admiralty, or Ecclesiastical and Testamentary courts among civilians. Their jealousy of the common lawyers, and a concealment of what passes among

said,[1] the law they applied was often contained only in their note-books and memories, and was sometimes little more than a legal tradition which could not be accurately verified. The writer of the preface to Hay and Marriott's decisions, though he passes a somewhat exaggerated criticism upon the defects of some of the common law reports, and of the effects upon the law of the works of writers "who perpetuate much bad reasoning in much bad language,"[2] and though he insists on Justinian's principle *non exemplis sed legibus judicandum est*,[3] yet advocates the publication of reports of cases decided in the Ecclesiastical courts, as well as in the court of Admiralty.[4] But this wish was not realized till 1822 when Haggard published his reports of cases decided in the consistory court of London from 1789-1821. Reports of appeals to the Privy Council in Prize cases were published in 1809 by T. H. Acton, and reports of appeals in other classes of cases in 1829 by J. W. Knapp.

Probably the publication of reports of decisions in the Admiralty and Ecclesiastical courts, and perhaps in the Privy Council, would have come sooner if there had been less professional jealousy between the civilians and the common lawyers, and if the civilian tradition had not been opposed to the traditional theory of the common law, that the law should be based on decided cases. At any rate it is clear that excellent material existed, which was used by Joseph Phillimore in 1833, when he published from the note-books of Dr. Lee,[5] the judge of the Arches and Prerogative courts of Canterbury, his decisions

the little knot of practitioners, seems to have occasioned that respectable and learned profession to be compared to the Talmudists among the Jews, who only dealt in oral traditions and secret writings. No persons were allowed to be professed practical conjurers but the Sanhedrin themselves," Preface to the reports of Hay and Marriott's decisions i; cp. Collect. Jurid. i 82.

[1] "In the note books and in the memories of the advocates of Doctors' Commons, precedents also existed which were utilized both by the advocates and by the judge, but they were hardly more than legal traditions often liable to be misunderstood, for they could not be accurately verified," E. S. Roscoe, Life of Lord Stowell 34.

[2] "Too many of the common law reports . . . are chiefly the production of illiterate clerks, who misunderstand, and which mark the low characters of the writers who perpetuate 'much bad reasoning in much bad language,'" Preface xxix-xxx.

[3] Code 7.45.13. "All arguments upon precedent deserve little to be relied upon. False principles or false consequences are to be found in many reports, and only show how much mankind are disposed to pervert justice under the appearance and pretence of doing it. It is by the principle, and not by the precedent of the decree, matters should be adjudged," Preface to Hay and Marriott's decisions, p. xxx.

[4] "It is to be hoped that now that the veil of the temple is drawn back, some advocate equally accurate with Dr. Robinson, will publish reports of cases adjudged in the Ecclesiastical and Testamentary courts, and under judicial approbation and sanction," ibid ii; this wish had been expressed by Gibson as early as 1713, Codex Pref. p. iii, cited below 613 n. 1, and by Burn in 1763, Ecclesiastical Law Pref. p. xviii, cited below 613.

[5] For Dr. Lee see below 666-669.

between the years 1752 and 1758;[1] and by Marsden in 1885, when he published reports of Admiralty and Prize cases decided between the years 1758 and 1774, from the MSS. of Sir William Burrell, who had practised as an advocate before the Admiralty and Ecclesiastical courts.[2] Thus the practice of reporting cases and of basing the law upon the decisions in those cases, which had been begun by the common lawyers, spread to all the other courts which administered bodies of English law outside the jurisdiction of their courts. It is a striking example of that power of the common law to impose its own conceptions on other systems of law which we have seen that it showed from a very early period in its history.[3]

(ii) *The beginnings of separate series of reports.*

This extension of the practice of reporting cases to many other courts led to a more distinct separation between the collections of cases decided in these different courts. The reports of the decisions of the House of Lords, of the Ecclesiastical courts, of the Admiralty courts, and of the Privy Council, which emerged at the end of the eighteenth and the beginning of the nineteenth centuries, have always been completely separate series. There was also a rough separation between reports which dealt mainly with decisions of the courts of common law and those which dealt mainly with decisions of the court of Chancery, and between the separate series of reports which dealt mainly with the decisions of the separate courts of King's Bench, Common Pleas, and Exchequer.[4] But down to the middle of the eighteenth century the separation between the separate series of Chancery and common law reports was by no means a complete separation. Wallace says:[5]

> The Modern Reports, Ventris, Salkeld, Fortescue, Comyns, Fitz-gibbon, Strange, W. Kelynge, Ridgeway, W. Blackstone, Kenyon, and other reporters prior to the reign of George III, all occasionally record cases in equity; just as, on the other hand, Peere Williams and other Chancery reporters sometimes preserve a note of decisions at law. Cases in the Exchequer, also, and those in the Ecclesiastical courts, were formerly thrown in with the reports of decisions in the other courts.

[1] Wallace, op. cit. 521-522.

[2] Sir William Burrell, Marsden tells us in his Preface, practised as an advocate in the Ecclesiastical and Admiralty courts in the middle of the eighteenth century; "he was born in 1732 and died in 1796; was a Fellow of the Royal Society and of the Society of Antiquaries, a member of the College of Advocates, Chancellor of the dioceses of Worcester and Rochester, member of Parliament for Haslemere, a commissioner of Excise, and author of the Burrell MSS. in the British Museum, a work well known to Sussex antiquarians."

[3] Vol. ii 400, citing Pollock, Expansion of the Common Law 16-19.

[4] See the tables printed in vol. vi 552-553, and the account given of the Chancery reports at pp. 616-617.

[5] The Reporters 457.

Thus, the reports of Willes, Chief Justice of the Common Pleas,[1] contain some cases in the House of Lords.[2] This mixture of cases decided in different courts was inevitable so long as the reports were made by individual practitioners and judges mainly for their own use. They naturally reported the cases in which they had been engaged, in whatever courts these cases were heard. It was, as we shall see, not till reports were made by reporters who made it their business to report the cases in a particular court, that the separation between the different series of reports was complete.[3]

There was also another kind of separation between the different series of reports which was emerging in the eighteenth century. We begin to get special reports of particular classes of cases.

Appeals from quarter sessions to the King's Bench in settlement and other cases were one of the earliest of a particular class of cases to be specially reported. A collection of Sessions Cases decided between the years 1710 and 1748, said to be from the collection of an eminent barrister deceased, was published between the years 1750 and 1754.[4] Burrow,[5] at the request of justices of the peace and counsel attending quarter sessions, published a collection of cases on the law of settlement decided between 1732 and 1753.[6] As he pointed out in his preface, his position as Master of the Crown Office gave him unique opportunities for reporting the orders made by the court on these cases. Another series of these cases, decided between 1776 and 1785, was published by Caldecott in 1786.[7] It was meant to be a continuation of Burrow, enlarged to include other kinds of cases which came before the justices.[8] Other collections of cases on settlements were made by Bott which went through many editions,[9] and by Nolan.[10]

[1] Below 132-133; Wallace, op. cit. 438-439.

[2] E.g. Parkhurst v. Smith (1741) Willes 327.

[3] Below 117.

[4] Preface; Wallace, op. cit. 417, calls it "an indifferent book or worse"; but it went through three editions.

[5] For Burrow see below 110-111.

[6] Wallace, op. cit. 433.

[7] Ibid 543; he was a friend of parson Woodforde, and, like him, a Wykehamist and a fellow of New College; for old acquaintance sake Woodforde bought his reports, see MacKinnon, The Murder in the Temple and other Holiday Tasks 66-67.

[8] The preface points out that the cases for the intervening years, 1753-1775, are digested by Burn.

[9] Wallace, op. cit. 412; the book also contains statutes relating to the poor law; some of the cases are said to come from the MS. of John Ford, Esq.; the cases are distributed under the following heads: Overseers, Poor Rate, Maintenance of Poor Relations, Bastards, Certificates, Apprentices, Orders of Removal, Sessions, Settlements; it first appeared in 1771 and the earliest case reported was decided in 1761; there were new editions in 1773, 1793, and 1800: F. Const edited the fifth edition which appeared in 1807, and J. Tidd Pratt edited the sixth edition which appeared in 1827, Wallace, op. cit. 545 n. 1.

[10] The cases reported are from the years 1791-1792.

A second class of cases which were specially reported were cases on Crown law. The most famous collection of these reports is that of Mr. Justice Foster, of which I shall speak later.[1] Another is Leach's reports of Crown cases.[2] The book was the outcome of the author's work on the sixth edition of Hawkins's *Pleas of the Crown*. Many of the cases there referred to were to be found only in MS. notes; and the editor was criticized for relying on authorities to which the profession had no ready access. The reports were published in the first instance to remedy this cause of complaint.[3] The author was a learned lawyer who did valuable work in editing the Modern Reports, and also Croke's and Shower's King's Bench reports.[4] His reports of Crown cases have passed through many editions.

A third class of cases specially reported were cases on practice. To this class belong the Practical Register of the Common Pleas (1704-1742);[5] the reports of Cooke, a prothonotary of the court of Common Pleas (1706-1747);[6] and Barnes's Cases of Practice (1732-1760), whose work was said by Buller, J., to have been generally accurate.[7] To this class also belongs Lilly's Reports and Pleadings of Cases in Assize. This book was published by Nelson in 1719, after the author's death, accompanied by a preface from the MS. "of a late eminent clerk and principal of Clifford's Inn." It contains only seven cases and has an appendix of forms.[8]

Election cases were a fourth class of cases which were specially reported. There were several series of these cases published in the eighteenth century. The first was by Douglas, the author of the King's Bench Reports, which was published in 1775.[9] It was followed by three other series—Fraser 1776-1777, Phillipps 1782, and Luders 1785-1790; and many other series were issued in the nineteenth century.[10]

Lastly, quite at the end of the century, two series of *nisi prius* cases were begun—one by Peake (1790-1812), and the other by

[1] Below 135-137.
[2] Wallace, op. cit. 430.
[3] Preface to the first edition.
[4] Vol. vi 557, 559.
[5] Wallace, op. cit. 415-416; to be distinguished from Lilly's Practical Register which is an abridgment; for this work see below 376.
[6] Wallace, op. cit. 416-417.
[7] Ibid 432-433.
[8] The full title is "Reports and Pleadings of cases in assize for offices, nuisance, lands, and tenements; showing the manner of proceeding in Assizes of Novel Disseisin from the original to the judgment and execution; with a Prefatory Discourse showing the nature of that action and reasons for putting it in practice"; cp. ibid 423.
[9] The full title is "The History of Cases of Controverted Elections tried and debated during the first and second sessions of the 14th Parliament of Great Britain, 15, 16 Geo. III"; it is in four volumes, and the first volume contains an introduction dealing with the jurisdiction of the House of Commons, the authority of precedents in these cases, the constitution of committees for trying these cases, and the manner of their procedure; cp. Wallace, op. cit. 453.
[10] Ibid 544.

Espinasse (1793-1807)—the former is said to be very accurate,[1] the latter very inaccurate.[2]

(iii) *The style of the reports and the rules of law reporting.*

When each reporter made his own reports primarily for his own use, and only secondarily for publication, the styles in which the reports were made were naturally very various.[3] But the growth of these special classes of reports shows that the reporting of cases for publication was becoming a recognized pursuit; and this raised the question of the rules which a reporter should observe in order to make a report which was at once brief, accurate, and intelligible. Bacon had answered this question at the beginning of the seventeenth century.[4] But it is not too much to say that, though there was some approximation to the principles which he had laid down in some of the better reports, the very different styles which each reporter adopted prevented his principles from gaining universal acceptance. It was not till Sir James Burrow, Cowper, and Douglas reduced these principles to rules for the guidance of reporters, and proved their worth by the reports which they made in accordance with those rules, that the style of law reporting was fixed for future generations of reporters. Though these rules were explained and applied in the first instance by those who reported cases in the common law courts, they were followed by those who reported cases in other courts; but at the end of the century we shall see that it was beginning to be recognized that the differences between the systems of procedure and pleading in the common law courts and the court of Chancery made it necessary that the technique of the reporter of equity cases should differ somewhat from the technique of the reporter of common law cases.[5]

Sir James Burrow (1701-1782)[6] held the post of Master of the Crown Office from 1733 till his death in 1782.[7] He was made a bencher of the Inner Temple in 1754 and treasurer in 1765. He was a fellow of the Royal Society, and its president in 1768 and 1772. He was knighted in 1773 on the occasion of the presentation of an address to the King by the Society. As Master

[1] Wallace, op. cit. 541; Peake's first vol. runs from 1790-1794, and his second vol., which he called "Additional Cases," runs from 1795-1812.

[2] Small v. Nairne (1849) 13 Q.B. at p. 844, *per* Lord Denman C.J.

[3] For Cowper's statement of this fact in the Preface to his reports see below 113 n. 4.

[4] De Augmentis Bk. viii c. 3 Aph. 74, cited vol. v 374 n. 1.

[5] Below 114-115.

[6] D.N.B.

[7] For the devolution of this office and for some litigation connected with it see Bellamy v. Burrow (1735) Cases t. Talbot 97; Burrow at first held it as trustee for Bellamy, the former holder, and, as he had died insolvent, for Bellamy's creditors —receiving "a liberal allowance" for his services, ibid at p. 108.

of the Crown Office he had a unique opportunity for reporting the decisions of the court, for he was always present at the hearing of the cases; he had a place in the middle of the court which enabled him to hear well and to write down what he heard, and he had access to the records of the court.[1] He intended to publish in four parts the cases decided in the court of King's Bench under the four successors of Lord Raymond C.J.—Lord Hardwicke, Sir William Lee, Sir Dudley Ryder, and Lord Mansfield.[2] He had decided, he tells us, to begin his reports from the death of Lord Raymond in 1733 because he himself had succeeded to the mastership of the Crown Office in that year.[3] But he began the publication of his reports with the accession of Lord Mansfield to the chief-justiceship in 1756, partly because the later cases were more sought after by the profession, partly because he wished to be delivered from the annoyance of the frequent requests made to him for the loan of the notes of these cases,[4] but chiefly because the abilities shown by Lord Mansfield and his colleagues, and the reforms in the practice of the court which they made, had begun a new era in the history of the court.[5] He never published his reports of the earlier cases. His five volumes cover the period 1756-1772.[6]

In the preface to the first volume of his reports Burrow explains the rules which he had followed in making his reports. In the first place, he did not report cases which turned upon facts and evidence only, or where the order was made as of course, or when the case was uncontested. In the second place, he was careful to state the facts correctly.[7] In the third place, though

[1] "When I entered upon that office, I thereby came to have all the records and rule books on the *Crown* side of the court in my own power, and could inspect and transcribe them at pleasure: besides which, as I never after that time stirred out of the court till it rose, I was sure to miss nothing that passed in it. Add to this that I had *now*, by my situation in the very middle of the court, better convenience both of hearing and writing, than I had had at the bar, in the outermost rows. I then came also to have better opportunities of procuring the true states of the cases on the *Civil* side of the court," Preface to the Reports.

[2] This is clear from the title-page to the first edition of his first volume—"Reports of Cases, Adjudged in the Court of King's Bench since the death of Lord Raymond, in Four Parts, distributed according to the times of his four successors, Lord Hardwicke, Sir William Lee, Sir Dudley Ryder, and Lord Mansfield."

[3] "Lord Raymond and my immediate predecessor in office happening both to die in the same vacation, I was sworn into my present office as soon as the court sat after Lord Raymond's decease, viz. on the first day of *Easter* Term 6 Geo. 2 1733. Lord Raymond's *death* seems therefore to be the fittest *Aera* from whence to begin: and the rather, because his Lordship's *own* reports (ending with Trinity Term 5 and 6 Geo. 1732) have been published since his death."

[4] As to this see below 116.

[5] These reforms, which Burrow clearly summarizes in his preface, are dealt with below 494-503.

[6] Vol. i 1756-1758; vol. ii 1758-1761; vol. iii 1761-1766—in this volume settlement cases were omitted as they had been separately published, above 108; vol. iv 1766-1770; vol. v 1770-1772.

[7] "Its merit consists in the correctness of the *States* of the Cases."

the arguments and judgments were not taken down verbatim, because he did not write shorthand, he tried to convey their sense as accurately as possible in his own words.[1] Lastly, he says, "I pledge my credit and character *only* that the *Case* and Judgment, and the *outlines* of the ground or reason of decision are right." "Burrow's Reports," says Wallace,[2]

> may fairly be called "works of art,"—the reporter's work, the arguments of counsel upon it, and the superior labours of the court commenting and deciding upon both; his statement of facts, the contest of the bar upon their effect, and the court's more valuable opinion upon all, being correlates, not repetitions; and the whole report—case, arguments, and opinion—going out to the bar separate in form as distinct in nature, each from the other; each complete in itself, but having, one with all, exact and reciprocal adaptation, and presenting *so* a full, harmonious, but never redundant whole.

Since the excellence of the reports which Burrow made in accordance with these rules proved the soundness of his rules and induced his successors to accept them, their publication marks a great advance towards the establishment of the modern form of law report.

In another respect also Burrow's reports mark an epoch in the history of law reporting. It was generally thought that a reporter must get the sanction of the judges to the publication of his reports; and in the earlier part of the eighteenth century this sanction was generally got, and printed at the beginning of the volume. Burrow himself was at one time of this opinion. In a note in his copy of Fitz-Gibbon's reports,[3] which had not got this sanction, he tells us that Lord Raymond had threatened to punish the publisher, because the reports "had made the judges, and particularly himself, to talk nonsense by wholesale"; [4] and he himself condemned their publication without licence.[5] But, when the time came to publish his own reports, he had changed his mind as to the necessity for the judges' licence. He had come to see that obtaining their licence was a meaningless survival from the time when the Licensing Act was in force, which possessed no practical value. He said: [6]

> Licences by the Chancellor and Judges proceed upon the character of the reporter only; without saying a word of the *work* itself, or that

[1] "I do not take my notes in short hand. I do not always take down the *restrictions* with which the speaker may *qualify* a proposition, to guard against its being understood universally, or in too large a sense. And therefore I caution the reader always to *imply* the exceptions which ought to be made, when I report such propositions as falling from the judges. I watch the *sense*, rather than the *words*; and therefore may often use some of my own."

[2] The Reporters 449.

[3] Below 138-139.

[4] Wallace, The Reporters 428.

[5] Ibid.

[6] Preface to vol. i of his reports.

the licensers even *saw* it. Such licences (to allow and approve of the printing and publishing) took their rise from the necessity of a licence to print, as the law *formerly* stood ; [1] and having *continued* in the same *form* of words (without any meaning) *since* the *reason* of them has *ceased*.

This was so obviously true that the custom of obtaining the imprimatur of the judges ceased about this date. When Bentham in 1823 said that persons who published reports did so at the risk of being punished for contempt of court, he was stating as existing law a rule which had long been obsolete.[2]

Henry Cowper, the descendant of a legal family, clerk assistant of the Parliament, and Burrow's successor as the reporter of cases decided by the King's Bench,[3] acknowledged his indebtedness to Burrow for the help which he had given to him ; and his work in reporting the cases decided between 1774 and 1778 shows that he had profited by Burrow's help and example. After remarking that no two persons agreed as to the proper method of making a report,[4] he says that his own method had been, not to give the pleadings and arguments in too great detail ; but " with respect to the judgment of the court I have endeavoured to be as faithful accurate and full, as the assistance of shorthand and the most earnest attention could enable me to be."

His successor, Sylvester Douglas, a scientific and classical scholar who, after taking silk, deserted law for politics, and became an Irish peer with the title of Lord Glenbervie,[5] described in detail, in the preface to his reports,[6] the methods which a reporter should adopt. His reports completed the development which Burrow had begun ; and his disquisition on law reporting had much to do with fixing the modern report in its

[1] 14 Charles II c. 33 § 3 ; vol. vi 368, 372.

[2] Truth v. Ashhurst, Works v 235 ; but it may be noted that pressure was occasionally put upon a reporter to omit a case ; thus Mansfield persuaded Foster to omit a case where he had dissented from the other judges, and Hardwicke persuaded him to omit a case in which Ryder C.J., he, and the other judges had expressed divergent opinions, Michael Dodson, Life of Foster 32-33, 42-43 ; Dodson included these cases in later editions of Foster's reports.

[3] He was grandson of William Cowper, clerk of the Parliaments, and great-grandson of Spencer Cowper, who was the younger brother of Lord Chancellor Cowper, D.N.B.

[4] " It is next to impossible, when there is a diversity of opinions, to fix upon any plan that will be entirely free from objection : and there is perhaps no subject about which the profession differ more than the proper method of reporting."

[5] D.N.B.

[6] The first two volumes were published by Douglas ; the last two volumes were published in 1831 by Henry Roscoe from the MSS. of Douglas, Laurence J., Le Blanc J., Mr. George Wilson, and the note-books of Buller J., Sir Thomas Davenport, and Mr. Bowyer ; part of the work of editing in vol. 4 was done by serjt. Frere, and his name appears on the title-page of that volume ; the editor omitted the settlement cases reported by Caldecott, and added notes calling attention to later decisions, see Pref. to vol. 3.

final form.[1] He tells us that he examined the pleadings, and procured copies " of almost all the special verdicts, cases reserved, and material rules, affidavits, and exhibits." He also made search in the Crown Office, and the office of the clerk of the rules ; and examined the cases sent from the court of Chancery. He took particular care to state accurately the facts of each case—examining the briefs of counsel, and collating his own notes of the evidence with the notes of those present at the trial, and of counsel engaged in the case. In reporting his cases he followed the example of his predecessors Burrow and Cowper, and adopted a middle course between a statement of the whole of the pleadings and arguments, and a mere abridgment of the case. He stated all material facts and documents—the latter when necessary verbatim.[2] He summarized the arguments of counsel, and gave as accurately as possible the gist of the judgment from his own recollection and that of others.[3] He verified the references to cases cited. He threw together in one report all the different stages of the case. He added in the notes additional cases to illustrate or confirm the doctrines laid down in the cases, and occasionally a note on a relevant point of law.[4] He inserted marginal notes as to the principal points decided in each case, a table of matters, and indices both of the cases reported and of the cases cited. The reports which follow these reports of Burrow, Cowper, and Douglas, show that law reporting has become standardized, and that the law report has taken upon itself its familiar modern form.

These rules of law reporting were to a large extent applicable to all reports whether in the common law courts or elsewhere. But it was recognized by Anstruther, who reported cases both

[1] Lord Campbell tells us that, when Douglas became a peer, he ascribed his rise to his reports of Lord Mansfield's decisions, and took as his motto " per varios casus," Lives of the Chief Justices ii 405 *note*.

[2] " I have been particularly attentive to state whatever was material in the pleadings or evidence, and sometimes, where I was afraid of omitting what might be deemed essential, I have set forth *verbatim*, a case, a plea, or a special verdict."

[3] " The judgments of the court I could have wished to give in the words in which they were delivered. But this I often found to be impracticable, as I neither write short-hand, nor very quickly."

[4] " I am not without the apprehension of meeting with some degree of censure for having on different occasions given a place, in the notes, to arguments and observations of my own. I trust I have throughout avoided the appearance, as I certainly never entertained the design, of discussing or controverting the solemn judgments of the court. This, it is true, was both recommended and practised by Mr. Justice Foster in his reports, but I cannot help thinking it very far from being any part of the reporter's province. . . . I have merely attempted, in some places, to illustrate or confirm the doctrines laid down in the text, by authorities which have occurred to me in the course of my reading, or arguments which the subject matter may have suggested. Sometimes, though rarely, I have entered into the consideration of general legal questions ; but if the reader is not too severe a critic, he will have some indulgence for that part of the notes, as no ideas of my own have been suffered to obtrude themselves upon him in the text."

on the common law and on the equity side of the court of Exchequer, that two differences between the common law and equity systems of procedure and pleading made some differences in the style of the law report necessary.[1] In the first place, in a court of law the facts were generally found by a jury and the arguments were directed to eliciting the legal consequences of those facts; but in a court of equity the court found the facts "and the arguments of counsel and the opinion of the court generally contain both the result of the fact from the evidence, and the inference of law from that fact." It would needlessly lengthen the report if all the arguments on the evidence were reported. Therefore it became necessary "to prefix to each case that statement of the facts upon which the opinion of the court proceeded," and thus to base the report upon a set of ascertained facts, just as the reports of cases in the courts of common law were based on the facts ascertained in the record. In the second place, the system of common law pleading was directed to producing a single definite issue,[2] so that "every fact and argument in the cause tends to support one general proposition"; but the system of equity pleading was directed, not to producing a definite issue, but to the doing of complete justice to the parties in respect of the matters set out in the pleadings and proved by the evidence.[3] Hence in equity there is no single issue, but often "a variety of unconnected cases are brought together by some collateral circumstance into the same cause." This made the task of the reporter of equity cases more difficult. It was frequently necessary "to give each point in the cause, and the arguments and decisions upon it, separately." Obviously the need to take this course made the reports of equity cases longer than the reports of common law cases; and, as the equity procedure grew more elaborate, the difficulties of the reporter and the length of the report tended to increase. The fact that the system of developing the law by means of decided cases was less suited to the system of procedure and pleading which had been developed in the court of Chancery, than to the system of procedure and pleading which had been developed in the common law courts, was emphasized;[4] and it is illustrated by a comparison between the common law reports and the equity reports under the unreformed systems of the common law and Chancery procedure. As a general rule it is more easy to ascertain the point decided by a case decided in the common law courts and the principle upon which it is decided, than to extricate from some of the reports of equity cases the essential points of the case and the principles applied to decide those points.

[1] Anstruther's Reports, Preface v-viii.
[2] Vol. iii 627-628; vol. ix 264.
[3] Ibid 338, 378.
[4] Vol. vi 670-671.

(iv) *The beginning of the regular publication of contemporaneous reports.*

Burrow is the connecting-link between the reporters of the old school who wrote their reports primarily for their own use, and the reporters of the new school who wrote their reports primarily for publication. In one respect he is a reporter of the old school. He wrote his reports primarily for his own use; and, like many of his predecessors, he was driven to publish them by the importunities to which he was subjected by those who wished to make use of them.[1] He says:

> As it was become generally known that I had taken some account of all the cases which had occurred in the court of King's Bench for upwards of 40 years, I was subjected to continual interruption and even persecution, by incessant applications for searches into my notes; for transcripts of them; sometimes for the note books themselves (not always returned without trouble and solicitation); not to mention frequent conversations upon very dry and unentertaining subjects, which my consulters were *paid* for considering, but I had no sort of concern in. This inconvenience grew from bad to worse, till it became quite insupportable: and from thence arises the present publication.

But in all other respects he is the father of the new school; for he explained and exemplified the manner in which a report ought to be made. When these principles of reporting had been accepted, only one short step was needed to introduce substantially the modern conditions. That step was the publication of the report as soon as possible after the decision of the case. It was taken when the reporters Durnford and East inaugurated the Term Reports of cases in the court of King's Bench. They said [2] that the primary object of their reports was "to remedy the inconveniences felt by every part of the profession of waiting two or three years, till some gentleman of experience and ability has collected matter sufficient to form a complete volume." They also pointed out that, in consequence, they could aim only at accuracy, since "to polish and digest properly requires long time and much labour." But, in spite of this disclaimer, their reports, like those of Burrow, Cowper, and Douglas, have always had a very high reputation.[3] East was a learned lawyer who wrote a good book on the Pleas of the Crown. When he and his partner Durnford ceased to publish their reports in collaboration

[1] See vol. v 365-366, 366 n. 1. [2] Preface to vol. i.

[3] "Lord Mansfield is handed down to us by Burrow, Douglas, Cowper, Durnford and East, the very best law reports that have ever appeared in England," Campbell, Lives of the Chief Justices ii 405; Wallace, the Reporters 529 n. 2, says, "none of the modern Reports exceed these for the care and accuracy of finish, including great propriety of style, which they everywhere maintain. They are equally distinguished by the terseness and comprehensive accuracy with which the point adjudged is given in the reporters' syllabus, and by the care with which the references to cases cited have been verified before the work went through the press."

in 1800, he continued to report cases in the King's Bench till 1812; and in the following year he was appointed Chief Justice of Calcutta.[1]

The example set by Durnford and East in the court of King's Bench was shortly afterwards followed in the other courts.[2] In 1788 Henry Blackstone in the Common Pleas,[3] in 1789 Vesey in the court of Chancery,[4] in 1792 Anstruther in the court of Exchequer,[5] and in 1812 Dow in the House of Lords, established regular series of reports.[6] This was the origin of the so-called "authorized reports," which for some time enjoyed the privilege of exclusive citation in the courts.[7] But their history, and the history of the later developments in the history of the reports belong to the following century.

These, then, are the chief developments in the history of the reports during the eighteenth century. Let us look at the list of the reports which appeared during this transition period.

(2) *The lists of the reports of this period.*

In the following Tables, which are a continuation of the Tables contained in a preceding volume,[8] I give the names of the reporters, the date of first publication, the dates of the birth and death of the author, the period over which the reports extend, the courts in which the cases are reported, the persons by whom they were first edited and published, and the origin of the MS. If the reports have been described in the text I have given a reference to the page: if not I have inserted a note as to their quality. The first Table gives the list of the reports in the common law courts and the House of Lords, the second the list of the reports in the court of Chancery, and the third, the list of the reports in the court of Admiralty, the Ecclesiastical courts and the Privy Council. The list of the reporters is arranged in the order of the date of the earliest cases reported by them.

[1] D.N.B.
[2] W. T. S. Daniel, The History of the Law Reports 268.
[3] Below 140.
[4] Below 143-144.
[5] Above 114-115; below 138.
[6] Above 104.
[7] W. T. S. Daniel, op. cit. 265-266, 268.
[8] Vol. vi 552-554; for the Chancery reports see ibid 616-619.

TABLE I

The Reports of Cases in the Common Law Courts and in the House of Lords

Name.	Date of First Publication.	Date of Author.	Period over which Reports Extend.	Courts in which the Cases are Reported.	By Whom First Published and Edited.	Origin of MS.	Remarks.
Lilly (Cases of Assize)	1719		1694-1713. One case of 1584	C.P. and Assizes	Nelson	Author's MS.	P. 109
Brown	1784		1702-1801	House of Lords	The author. Second edition by Tomlins 1803	Author's MS.	P. 104
Practical Register of the Common Pleas	1743		1704-1742	C.P.	Anon	Author's MS.	P. 109
Cooke	1742		1706-1747	C.P.	The author. Later editions 1747, and 1872 by T. T. Bucknill	Author's MS.	P. 109
Sessions Cases	1807		1707-1727	K.B.	Anon	From the collection of an eminent barrister deceased	P. 108
Cases of Settlement	1729		1710-1727	K.B.	Anon. Later editions 1732, 1742	Author's MS.	Later editions have an App. made up from cases from printed books and abstracts of statutes
Gilbert, Cases in Law and Equity	1760	1674-1726	1713-1715	K.B., Ch.	Anon. Second edition 1792	Author's MS.	P. 141

Bunbury	1755		1713-1742	Ex.	Wilson. Second edition 1793	Author's MS.	Pp. 137-138
Strange	1755	1695-1754	1716-1749	K.B., C.P., Ex., Ch.	Author's son. Later editions 1782, 1795	Author's MS.	Pp. 130-132
Barnardiston	1744	Died 1752	1726-1735	K.B.	The author	Author's MS.	P. 138
Fitz-Gibbon	1732		1728-1733	K.B., C.P., Ex. Ch.	The author	Author's MS.	Pp. 138-139
Leach	1789	1746-1818	1730-1815	K.B. (Crown side)	The author. Later editions 1792, 1800, 1815	Author's MS.	P. 109
W. Kelynge	1740		1731-1736	K.B., Ch.	The author	Author's MS. A second edition contains about seventy more cases	P. 139
Barnes	1754		1732-1754	C.P.	The author	Author's MS. Later editions with a supplement 1756, 1772, 1790	P. 109. Generally accurate
Burrow (Settlement Cases)	1768	1701-1782	1733-1768	K.B.	The author	Author's MS. Later editions 1776, 1786	P. 108
Ridgeway's Hardwicke	1794	Died 1817	Common Law Cases 1733-1737; Chancery Cases 1744-1746	K.B., Ch.	The author	A MS. of unknown authorship	P. 141
Lee's Cases t. Hardwicke	1769		1733-1737	K.B., Ch.	Anon	A MS. of unknown origin	Of good repute. Contains cases decided by Lee C.J.

TABLE I—*Continued*

Name.	Date of First Publication.	Date of Author.	Period over which Reports Extend.	Courts in which the Cases are Reported.	By Whom First Published and Edited.	Origin of MS.	Remarks.
Cunningham	1766	Died 1789	1734-1736	K.B.	The author	Author's MS. Later editions 1770, and 1871 by T. T. Bucknill	Some of the cases are probably taken from the same MS. as Ridgeway's Hardwicke and the additions made by Leach in 7 Mod.
Willes	1799	1685-1761	1737-1760	C.P., Ex. Ch., House of Lords	Durnford	Author's MS. Second edition 1800	Pp. 132-133
Andrews	1754		1738-1740	K.B.	The author	Author's MS. Second edition 1791	Of good repute. Some cases are ex relatione alterius, and are also reported in Strange and Lee's Cases t. Hardwicke
Foster	1764	1689-1763	1743-1761	K.B. (Crown side)	The author	Author's MS. Later editions 1776, 1796	Pp. 135-137
Parker	1776	1695-1784	1743-1767: the App. contains cases of 1678-1718	Ex.	The author	Author's MS. Second edition 1791	P. 133
Wilson	1770		1743-1775	K.B., C.P., Ch.	The author	Author's MS. Later editions 1775, 1779, 1792	P. 138

W. Blackstone	1780	1723-1780	1746-1780	K.B., C.P., Ch.	James Clitherow	Author's MS. Second edition 1780. Third edition by Elsley 1828	Pp. 133-134
Sayer	1775		1751-1776	K.B.	The author	Author's MS. Second edition 1790	According to Sugden an inaccurate reporter
Kenyon	Vol. i 1819, vols. ii and iii 1825	1732-1802	1753-1760	K.B.	Hanmer	Author's MS.	P. 134
Burrow (K.B.)	1756-1780	1701-1782	1756-1772	K.B.	The author	Author's MS. Many later editions; fifth edition by Serjt. Hill	Pp. 110-113
Wilmot	1802	1709-1792	1757-1770	K.B.	The author's son	Author's MS.	Pp. 134-135
Bott	1771		1761-1771 Continued in later editions to 1825	K.B.	The author	Author's MS.	P. 108
Lofft	1776	1751-1824	1772-1774	K.B.	The author	Author's MS. Second edition 1790	Pp. 139-140
Cowper	1783	1758-1840	1774-1778	K.B.	The author	Author's MS. Second edition 1800; Two American editions 1809 and 1833	P. 113
Douglas (Election Cases)	1775	1743-1823	1775	House of Commons	The author	Author's MS. Second edition 1802	P. 109
Caldecott (Magistrates' Cases)	1793	1743-1833	1776-1785	K.B.	The author	Author's MS.	P. 108
Fraser (Election Cases)	1776		1776-1777	House of Commons	The author	Author's MS.	P. 109

TABLE I—*Continued*

Name.	Date of First Publication.	Date of Author.	Period over which Reports Extend.	Courts in which the Cases are Reported.	By Whom First Published and Edited.	Origin of MS.	Remarks.
Douglas	Vols. i and ii 1778, vols. iii and iv 1831	1743-1823	1778-1784	K.B.	Vols. i and ii the author, vols. iii and iv Frere and Roscoe	Vols. i and ii author's MS.; vols. iii and iv author's MS. and MS. notes of judges and others	Pp. 113-114
Philipps (Election Cases)	1782		1782	House of Commons	The author	Author's MS.	P. 109
Term Reports (Durnford and East)	1785-1800	East 1764-1847	1785-1800	K.B.	The authors	Authors' MS.	Pp. 116-117
Luders (Election Cases)	1785	Died 1819	1785-1790	House of Commons	The author	Author's MS.	P. 109
H. Blackstone	1788		1788-1796	C.P.	The author	Author's MS.	P. 140
Peake	1790	1771-1838	1790-1794	Nisi Prius	The author	Author's MS.	P. 109
Nolan (Magistrates Cases)	1793	Died 1827	1791-1793	K.B.	The author	Author's MS.	P. 108
Anstruther	1792	1769-1819	1792-1797	Ex., Ex. Ch., House of Lords	The author	Author's MS.	Pp. 114-115, 138
Rowe (Parliamentary and Military Cases)	1792		1792	Various courts Mainly Irish	The author	Author's MS.	A heterogeneous book, containing cases in military courts, in Parliament, and in the Irish courts. It is accompanied by a treatise on Martial law. The book is of no great authority

Espinasse	1793		1793-1807	Nisi Prius	The author	Author's MS.	P. 110
Peake (Additional Cases)	1829	1771-1838	1795-1812	Nisi Prius	The author	Author's MS.	P. 110 n. 1
Bosanquet and Puller	1796	Bosanquet 1773-1814 Puller 1774-1824	1796-1804	C.P.	The authors	Authors' MS.	P. 135
Moore (A)	1800		1796-1794	C.P.	The author	Author's MS.	First printed in folio in 1800, and usually bound up with vol. i of Bosanquet and Puller's reports

TABLE II

The Reports of Cases in the Court of Chancery

Name.	Date of First Publication.	Date of Author.	Period over which Reports Extend.	By Whom First Published and Edited.	Origin of MS.	Remarks.
Dickens	1803		1559-1798	Wyatt	Author's MS.	P. 142
Equity Cases Abridged	Vol. i 1732; vol. ii 1756		From the earliest times to 1756	? Mathew Bacon	Author's MS.	Pp. 144, 171-172
Peere Williams	Vols. i and ii 1740; vol. iii 1749		1695-1736	The author's son	Author's MS.	P. 142
Gilbert	1734	1674-1726	1705-1726	Anon	Author's MS.	Pp. 140-141
Select Cases in Chancery	1740		1724-1734	Anon. Second edition by McNaughton 1850	Author's MS.	Not a book of very great authority in the opinion of Lord Redesdale and Lord Loughborough
Moseley	1744		1726-1731	Anon. Second edition 1793	Author's MS.	P. 142
Cases t. Talbot	1741		1734-1738	Alexander Forrester. Second edition 1753; third edition by J. G. Williams 1792.	Author's MS.	Pp. 142-143
West	1827		1736-1740	The author	From Hardwicke's and Forrester's MSS. and the Registrar's book	Comprises cases in Atkyns and other reporters corrected from Hardwicke's MSS. and other sources. It was the author's design to report in this way all Hardwicke's decisions; but he only left this fragment

Atkyns	1765-1780	Died 1773	1736-1755	The author	Author's MS. Second edition 1781-1782; third edition by Saunders 1794	P. 143
Ambler	1790		1737-1783	The author	Author's MS. Second edition by Blunt 1828	P. 143
Barnardiston	1742	Died 1752	1740-1741	The author	Author's MS.	P. 138
Ridgeway's Hardwicke	1754	Died 1817	Chancery cases 1744-1746; common law cases 1733-1737	The author	MS. of unknown origin	P. 141
Vesey Senior	1771-1773		1747-1756	The author	Author's MS. Second edition 1788; improved edition by Belt 1818	P. 143
Eden	1818	1708?-1772	1757-1767	Robert Henley Eden, Lord Northington's grandson	Lord Northington's MSS.	P. 144
Romilly, Notes of Cases	1872	1757-1818	1767-1786	Edward Romilly	Sir Samuel Romilly's MSS.	Selected by the editor from Sir Samuel Romilly's notes of cases, some of which were made by himself, and some taken from other MSS. or from accounts given to him by other persons
Brown	1785-1794		1778-1794	The author	Author's MS. Second edition by Eden in 1819. Another edition by Belt in 1820	Brown is said to have been an inaccurate reporter; but his reports have been improved by his editors
Cox, Chancery Cases	1816		1783-1796	The author	Author's MS.	P. 144
Vesey Junior	1789-1817		1789-1816	The author	Author's MS.	Pp. 143-144

TABLE III

The Reports of Cases in the Admiralty Prize and Ecclesiastical Courts and the Privy Council

Name.	Date of First Publication.	Date of Author.	Period over which Reports Extend.	Courts in which Cases are Reported.	By Whom First Published and Edited.	Origin of MS.	Remarks.
English Prize Cases	1905		1745-1859	Prize court	E. S. Roscoe	From the published reports and notes of cases in text books	The report of an inter-departmental committee on Prize law in 1902 recommended a collected edition of Prize cases
Lee	1833	1700-1758	1752-1758	The Arches and Prerogative court of Canterbury	Phillimore	Lee's Note-Books	Pp. 106-107, 667
Burrell	1885	1732-1796	1758-1774	Admiralty and Prize courts	Marsden	Author's MS.	P. 107
Hay and Marriott	1801	Hay 1715-1778 Marriott 1730?-1803	1776-1779	Admiralty and Prize courts	Anon	Authors' MS.	P. 105
Haggard	1822	1794-1856	1789-1821	Consistory court of London	The author	Author's MS.	P. 106
C. Robinson	1798	1766-1833	1799-1808	Admiralty and Prize courts	The author	Author's MS.	P. 105
Acton	1809		1809-1811	Privy Council, Prize cases	The author	Author's MS.	P. 106
Knapp	1831-1836		1829-1836	Privy Council	The author	Author's MS.	P. 106

These reports deal principally, but not exclusively, with civil cases. A few criminal cases are, as we shall see, excellently reported by Foster.[1] But, on the whole, the criminal law is not well represented. To some extent this lacuna is filled by the reports of the "State Trials," which contain important cases in public law and in criminal law. Of the series of state trials, which began to be compiled at the beginning of this century, I must at this point say a few words. In the first place, I shall give an account of the editions of these trials, which begin in 1719, and were expanded in successive editions, till the publication of the standard edition which appeared between the years 1809 and 1826. In the second place, I shall say something of the characteristics of these editions.[2]

(i) The first edition of the state trials was published in four quarto volumes in 1719. It began with the trial of William Thorpe for heresy in 1407, and ended with Sacheverell's impeachment in 1710.[3] It was edited by Thomas Salmon, who published in 1720 and 1731 an abridgment of the state trials, and in 1737 *A New Abridgment and Critical Review of the State Trials*.[4] He died in 1767, and in the course of his career he had sailed round the world with Anson.[5] In 1737 a separate volume was published which contained the case of Ship Money, and the trial of Harrison for falsely accusing Hutton, J., of high treason.[6] The second edition was published in 1730 in six quarto volumes.[7] It was edited by Sollom Emlyn.[8] He added many trials of an earlier date which had been omitted in the previous edition;[9] and the sixth volume contained trials from the latter part of Anne's reign to the end of George I's reign.[10] This edition was followed in 1735 by two supplementary volumes under the same editorship, which contained cases from the reign of Edward VI to the date of publication.[11] The series was thus enlarged to eight volumes. In 1742 a third edition was published in six folio volumes, without the supplementary volumes. In 1766 the ninth and tenth volumes were published. Some trials of the early part of the eighteenth century, omitted in previous editions, were included, and the collection was carried down to 1760.[12] A fourth edition in eleven folio volumes was published under the editorship of Francis

[1] Below 136-137.

[2] The authorities upon which I have relied are the Prefaces to the various editions of the State Trials which are prefixed to vol. i of the octavo edition; Wallace, The Reporters 64-69; J. G. Muddiman, State Trials, The Need for a New and Revised Edition.

[3] Hargrave's Preface S.T. i xlvii.

[4] Ibid.

[5] Muddiman, op. cit.

[6] 1 S.T. xlviii.

[7] Ibid xlviii-xlix.

[8] For Sollom Emlyn see vol. vi 590; vol. xi 528-529.

[9] See his Preface 1 S.T. xl, xlviii.

[10] Ibid.

[11] Ibid xlii-xliv, xlix.

[12] Ibid xlv-xlvi, xlix.

Hargrave [1] between the years 1775 and 1781. To the first volume Hargrave prefixed an account of the different editions of the *State Trials;* [2] and he explained, in the preface to the eleventh volume, that his work had been confined to writing these prefaces, and to the collection and editing of the cases in the eleventh volume.[3] The fifth and latest edition, which has superseded all the others, was published by Cobbett in thirty-three octavo volumes between the years 1809 and 1826. The first twenty-two volumes were edited by Thomas Bayley Howell, and the remainder by his son Thomas Jones Howell. This edition contains the prefaces to the former editions and many additional cases; and the cases are chronologically arranged. The last trials reported are the trials of Thistlewood and others for high treason in 1820. Jardine, the author of a well-known work on Torture and other learned works,[4] supplied an excellent index volume. In 1885 the government adopted a proposal of Lord Thring, and inaugurated a new series of state trials, which were excellently edited by Sir John Macdonell.[5] This series is in eight volumes, and the cases run from 1820 to 1858. The last case reported is *Ex parte Robertson*, which was heard by the Privy Council in July 1857 and June 1858.

(ii) The man who first conceived the idea of a series of state trials was John Darby, a printer and publisher of Bartholomew Close, who died in 1733. He carried on the business founded by his father, and both were Whigs and dissenters. The project of a series of state trials was first mooted in 1716, and advertisements of its appearance, and requests for materials, were inserted in the *Gazette* in 1716 and 1717. Darby supplied the materials which Salmon edited.[6] It was an odd combination; for Salmon was a high Tory; and his *Critical Review of the State Trials* was censured by Hargrave on account of the political prejudice which it displayed [7]—though he admits that it is a useful work, and that "even some of the animadversions which he makes under the malignant influence of party spirit may be deemed not altogether without foundation." [8] Salmon tells us that the publishers had spared no pains or expense to collect materials,

[1] For an account of Hargrave see below 410-411. [2] 1 S.T. xlvii-l.

[3] "I have taken the opportunity of declaring, that the only parts of the Work for which I am in any respect accountable, exclusive of the present preface, are the preface with my name in the first volume; and the selection of the Trials and Cases for this volume, with such annotations as I have given in the course of it, particularly those before the several Trials," ibid liii.

[4] D.N.B.; vol. v 185. [5] Preface to vol. i.

[6] J. G. Muddiman, op. cit.

[7] "In his political principles apparently an inveterate enemy to the Revolution, he is frequently betrayed by an intemperate zeal into a false notion of characters and opinions, and too often disguises both where the demon of party demands a sacrifice," 1 S.T. xlvii. [8] Ibid xlviii.

and that application had been made to any judges or counsel who were still living, and had been concerned in the trials reported, to correct the MS.[1] The earlier trials were compiled partly from chronicles and histories, and partly from the records; and Salmon admits that the older trials were less perfect.[2] The accuracy of some of the later trials, notably the Popish Plot trials, has been attacked;[3] but, though the reports were in some cases printed some years after the trial, there seems to be no reason to doubt their substantial accuracy. We have seen that the publication of reports of cases immediately after their decision was not known till the Term Reports appeared in 1785.[4]

Emlyn made considerable improvements in the second edition of the *State Trials*. The trials were inserted in chronological order, the names of the judges and counsel, dates, and notes and references were added. In an appendix a collection of records relating to the trials was added; and an account was given of the execution of the prisoner when he was convicted, and "an account (where it could be had) of his behaviour and speech at the place of execution."[5] The seventh and eighth supplementary volumes, which were published in 1735, show that the conception of a state trial was being expanded. Such cases as *Lady Ivy's Case*, *the East India Co. v. Sandys*, and *Ashby v. White*, which were not properly "trials," were included. Such cases, as the author of the Preface to the ninth and tenth volume says, though they "cannot, properly speaking, be called State Trials, yet may be deemed good precedents, . . . and it would be confining the Collection in too narrow a compass to insert only State Trials."[6] Hargrave considered that the collection was defective in that it did not contain a sufficiently representative collection of impeachments, and the proceedings on bills of attainder and bills of pains and penalties. But he admitted that to have included all the cases of this kind, which ought to have been included, would have increased the collection unduly.[7] He did something to remedy this defect by inserting some important constitutional cases of the seventeenth century, such as *The Case of Impositions*, *Calvin's Case*, and the *Bankers Case*. To the cases for which he was responsible he appended notes upon the sources from which the report was collected, upon some of the constitutional questions involved, and upon the authorities from which further information could be obtained.[8] The two Howells, father and son, did very good work in arranging

[1] 1 S.T. xix.

[2] "The farther we search into antiquity, and the higher we go, the less perfect will our accounts be; the same exactness cannot be expected there as in trials of a more modern date," ibid xx.

[3] J. G. Muddiman, op. cit.

[4] Above 116.

[5] 1 S.T. xl-xli.

[6] Ibid xlv.

[7] Ibid li.

[8] Ibid lii-liii.

and co-ordinating the mass of information which the labours of successive publishers and editors had accumulated. This series of state trials, as they left it, is an invaluable collection of nearly all the important criminal trials and constitutional cases, and of some important civil cases, which have some bearing upon public law. The reports are of very varying degrees of authority. They are, as Wallace has said,[1] "written by hundreds of different persons, some of them known but little, and many of them not known at all"; but the collection as a whole has "secured mechanical convenience, chronological order, and general access to the scarce and scattered contents of nearly every antiquarian library of England."[2] And it has not only given us the reports of many trials and other legal proceedings, it has also enriched these reports sometimes with extracts from or references to the record, and to memoirs, histories, and Parliamentary debates; and sometimes with notes on the points of law discussed in the cases. It is for these reasons that this series of state trials has a unique value for constitutional and legal historians, and a very considerable value for the historians of many other aspects of the national life. The aphorism of Albert Sorel, which the Selden Society has placed on the title-page of its Year Book series, is quite as applicable to this collection of state trials as to the Year Books.—"C'est toute la tragédie, toute la comédie humaine que met en scène sous nos yeux l'histoire de nos lois."

(3) *Some of the eighteenth-century reports and reporters.*

Some of the reports in the courts of common law were made by lawyers who attained judicial rank in England, and three sets of these reports were made by reporters who attained judicial rank in India. I shall, in the first place, say something of the reports in the courts of common law which were made by these lawyers, and then say something of the other reports.

Common law reports made by lawyers who attained judicial rank.

Of the reports of one of these lawyers—Comyns, C.B., who, as we shall see, is famous for his Digest[3]—I have already said something.[4] They were translated and published after his death by his nephew John Comyns.

The first of these sets of eighteenth-century reports was made by John Strange (1695-1754).[5] He began his study of the law as a pupil of Salkeld, the attorney of Brooke Street, Holborn, in whose office Hardwicke and Sir Thomas Parker also began their legal studies. He soon made his way at the bar. In

[1] The Reporters 68. [2] Ibid. [3] Below 168-169. [4] Vol. vi 563.
[5] Foss, Judges viii 166-169; D.N.B.; Wallace, The Reporters 420-423.

1728 he was one of the counsel who defended Macclesfield when he was impeached, and he took silk in 1736. In 1737 he was made solicitor-general; in 1738 he refused the offer of the Mastership of the Rolls; and in 1739 he was made recorder of London. But, having succeeded to a considerable property, he resigned these offices in 1742, and ceased to practise except at the morning sittings of the court of King's Bench.[1] In 1746 he prosecuted some of the rebels in the 1745 rebellion, and acted as one of the counsel for the Crown on Lovat's impeachment in 1747.[2] In 1750 he accepted the office of Master of the Rolls, which he held till his death in 1754. His reports were published by his son after his death. But he had himself prepared them for the press, since, like other lawyers before him,[3] he had reason to fear that they might be surreptitiously published by unscrupulous persons who had got copies of some of the cases. He says in the preface to his reports:

> Having during the first years of my attendance at Westminster Hall been pretty diligent and exact in taking and transcribing notes; I soon found, it introduced me to the honour of having them borrowed and transcribed by several of the judges and others. By this means they came into the hands of a gentleman, who had a servant so corrupt, as clandestinely to make several copies, and sell them to persons, who had not the honour to deliver them up, when the villany was detected. This put me under an apprehension that I should soon see some of them in print. And as many of them were only arguments in causes never adjudged, and therefore of no use to the publick; I thought it necessary to select those which were actually adjudged, and collect them together, that I might at ever so short a warning have it in my power, by printing a genuine, to suppress any surreptitious edition. With this view I caused my clerk to transcribe such cases, as I thought would be proper; and if no accident happens, that obliges me to publish them in my life, they will remain to be dealt with, as they who come after me shall think fit.

His fears were not altogether groundless. After his death *A Collection of Cases relating to Evidence*, which were said to have been stolen from his notes, was published, and an injunction against its continued publication was obtained by Strange's executors.[4] Strange's abilities as a lawyer are vouched for by Hardwicke and the Duke of Newcastle;[5] and the merits

[1] "Memorandum. Having received a considerable addition to my fortune, and some degree of ease and retirement being judged proper for my health; I this term resigned my offices of Solicitor-General, King's Counsel, and Recorder of the City of London, and left off my practice at the House of Lords, Council Table, Delegates, and all the Courts in Westminster Hall except the King's Bench, and there also at the afternoon sittings. His Majesty, when at a private audience I took leave of him, expressed himself with the greatest goodness towards me, and honoured me with his patent to take place for life next to his Attorney-General Anno aetatis meae 47," 2 Str. 1176.

[2] 18 S.T. 335, 469, 586.

[3] Vol. v 366 n. 1.

[4] D.N.B.

[5] Foss, Judges viii 169.

of his reports are proved by the fact that they reached a third edition. Though his reports have in one or two cases been criticized on the ground that, in his endeavours to be concise, he had become obscure,[1] there is no doubt that he was, as Willes, C.J., called him, "a faithful reporter."[2]

Willes, C.J.,[3] was a good judge of reports, since he himself has left a set of reports which have always had a very high reputation. Willes was born in 1685, and came to Oxford as an undergraduate of Trinity college. He was elected a fellow of All Souls, and was called to the bar in 1713. He was made Chief Justice of Chester in 1729, attorney-general in 1734, and Chief Justice of the Common Pleas in 1737, which office he held till his death in 1761. Though an accomplished lawyer, he was an unprincipled intriguer in politics, and a man of loose morals.[4] His great ambition was to become Lord Chancellor. When Hardwicke was made Lord Chancellor on the death of Talbot he deserted Walpole for Carteret; and later he deserted Carteret for the Pelhams, and the Pelhams for Pitt. When Hardwicke resigned, the great seal was put into commission, and Willes was made first commissioner. A few months later it was offered to him; but the King, probably on account of Willes' bad moral reputation, refused to make him a peer. Willes, thinking that he was indispensable, stood out for a peerage. As Walpole says,[5] he "proposed to be bribed by a peerage to be at the head of his profession, but could not obtain it." He was passed over, and the great seal was offered to and accepted by Sir Robert Henley. A selection from his reports was published after his death by Durnford, one of the editors of the Term Reports, who had been

[1] Foster, Discourses 292-294, criticizes Strange's report of R. v. Reason and Tranter (1721) 1 Str. 499 for omitting the direction of the Chief Justice to the jury, and adds "the circumstances omitted in the report are too material, and enter too far into the true merits of the case to have been dropped by a gentleman of Sir John Strange's abilities and known candour, if he had not been overstudious of brevity"; similar criticisms were made by Lord Mansfield C.J. in the case of Goodtitle v. Duke of Chandos (1760) 2 Burr. at pp. 1071-1072 on his report of Warren v. Greenville (1740) 2 Str. 1129; and by Dunning *arg.* in the case of Combe v. Pitt (1763) 3 Burr. at p. 1428 on his report of Jackson v. Gisling (1742) 2 Str. 1169; but in this case Strange's report was defended by Denison J., ibid at p. 1434; Burrow, however, said that if it was correct it was not sufficiently full, since his note had filled twice as many pages as Strange's had filled lines.

[2] Lynall v. Longbothom (1756) 2 Wils. at p. 38.

[3] Foss, Judges viii 398-401; D.N.B.; Wallace, The Reporters 438-439; below 450, 451, 454.

[4] "He was not wont to disguise any of his passions. That for gaming was notorious; for women, unbounded. There was a remarkable story current of a grave person's coming to reprove a scandal he gave, and to tell him that the world talked of one of his maid servants being with child. Willes said, 'what is that to me!' The monitor answered, 'Oh! but they say it is by your lordship.' 'And what is that to you?'", Walpole, Memoirs of the Last Ten Years of George II i 77. For the manner in which he upheld the dignity of his court against the pretensions of a court martial see vol. x 382 n. 5.

[5] Memoirs of the Last Ten Years of George II's Reign ii 226.

entrusted with the task by two of Willes's grandsons.[1] The reports were compiled from his MSS., some parts of which he had prepared for publication. Some of the later cases, in which he had left no full account of the judgment, were completed from the MSS. of Fortescue and Abney, JJ. In some of the other cases, in which the record was not abridged by Willes, the reporter supplied an abridgment of it. Notes on the cases made by Willes himself or taken from his MSS. were included, and also some notes made by Fortescue and Abney, JJ. His editor was right when he said that he thought that " the publication of these determinations would occasion his name as a lawyer to be held in as high estimation in succeeding ages as it was in the time when he lived." His reports, and those of Wilson, have been said to be the most authoritative of all the reports of George II's reign.[2]

Sir Thomas Parker,[3] who published the reports of his decisions in the court of Exchequer, was related to Thomas Parker, Lord Macclesfield. Like Hardwicke and Strange, he began his legal education in the office of Salkeld. Lord Macclesfield had befriended Hardwicke when he was starting at the bar, and in like manner Hardwicke befriended Parker. It was due to Hardwicke's influence that in 1738 he was made a baron of the Exchequer, in 1740 a judge of the Common Pleas, and in 1742 Chief Baron of the Exchequer. After presiding in the court of Exchequer for thirty years he resigned in 1772. He lived till 1784; and it was after his resignation that he prepared for the press and published in 1776 the reports of cases in the court of Exchequer, decided during twenty-four years of the period when he held the post of Chief Baron. He published these reports, he tells us, because there were few cases in print in which the law relating to the revenue was explained.[4] To these cases he added some others decided in the court of Exchequer between the years 1678 and 1718. The reports of these cases, he tells us, he had carefully transcribed from authentic MSS.[5]

Sir William Blackstone, in addition to his Commentaries, left a set of reports " all written with his own hand, and prepared for the press, even to an index and a table of matters." [6] Of Blackstone and his Commentaries I shall speak at length in the last section of this chapter.[7] His reports were compiled by him

[1] Durnford said in his Preface, " I have selected such cases as appeared to me of the greatest importance. All those respecting the practice of the Court (except in a very few instances) I have rejected altogether, not only because they were not of sufficient consequence to be printed in a work of this kind, but also because the decisions in many of them are already in print."

[2] Wallace, The Reporters 438, citing Kent's Commentaries 488.

[3] Foss, Judges viii 352-355; D.N.B.; Wallace, The Reporters 442.

[4] Preface. [5] Ibid. [6] Ibid xxviii. [7] Below 702 seqq.

during his active life at the bar and on the bench, and they extend to the Michaelmas Term 1779.[1] Since he died February 14, 1780, this was the last term during which he was able to attend his court.[2] In his earlier life Blackstone divided his time between Oxford and London and later resided for some time at Oxford.[3] For this reason there are breaks in the series of the earlier cases—between 1750 and 1756 no case is reported.[4] With the exception of his report of the case of *Burgess v. Wheate*, which he copied from Fazakerly's report, all the reports were taken by himself.[5] Blackstone in his will directed that his reports should be published. They were published by his brother-in-law and executor James Clitherow, who carefully revised the MS., and got a lawyer to help him to make a second revision and to verify the quotations.[6] It is remarkable that the only case of which the accuracy of Blackstone's report has been questioned is the case of *Burgess v. Wheate* which is the only case which he did not himself report.[7]

Lord Kenyon, C.J. (1732-1802), left some MS. reports which were held in such esteem that "in the case of *Doe v. Fonnereau* [8] Lord Mansfield directed another argument to be made solely on the ground of a different reason for a prior decision being contained in the note of Mr. Kenyon, from that stated in the report of Sir James Burrow." [9] Of Lord Kenyon I shall speak later.[10] His reports were edited and published by Hanmer—the first volume in 1819, and the second in 1825. Another Chief Justice who has left some reports of his decisions was that very remarkable character, Sir John Eardley Wilmot (1709-1792), of whom I shall speak later.[11] His notes on some of his cases were not prepared by himself for the press. They were published, together with a memoir, by his son in 1802, because "some of them having been handed about in manuscript, and having been made use of in court, a strong opinion was expressed by several gentlemen of the profession, that, however few in number, they were too valuable not to be made public." [12]

[1] Preface xxviii. [2] Ibid. [3] Below 705.

[4] Preface xxix; similarly, "in the three following years he attended the bar only in Michaelmas and Hilary Terms on account of his Lectures, consequently there are, among these reports, none of the Easter and Trinity Terms of those years, but from thence they continue in a regular series, except one term when he was indisposed, and the two terms immediately preceding his being promoted to the Bench, when he attended the court of Exchequer only," ibid.

[5] Ibid. [6] Ibid xxx-xxxi.

[7] Wallace, The Reporters 444; Lord Mansfield once questioned the general accuracy of his reports, Devon v. Watts (1779) 1 Dougl. at p. 93, but in the case of Price v. Helyar (1828) 1 Moore and Payne at p. 553, Best C.J. said that Blackstone "certainly took most accurate notes."

[8] (1780) 2 Dougl. at p. 507 and n. 3.

[9] Preface to vol. i of Kenyon's Reports.

[10] Below 576-583. [11] Below 479-482. [12] Preface.

We have seen that it was Wilmot's report of his undelivered judgment in the case of *R. v. Almon*,[1] which laid down the modern law as to the power of a judge to punish summarily by attachment a person who had libelled the court, or a judge in his judicial capacity.[2]

Both of the reporters Bosanquet and Puller attained judicial rank. Bosanquet [3] (1773-1847), after a successful career at the bar, was made a judge of the court of King's Bench in 1830, and from 1835 to 1836 acted as a lord commissioner of the great seal. Puller [4] (1774-1824) was made Chief Justice of Bengal in 1823. Both were lawyers of great learning; and they added to the value of their reports by the notes on points of law which they inserted. We have seen that it was one of these notes which was largely instrumental in placing the doctrine of consideration in relation to simple contracts on its modern basis.[5] The reporter East (1764-1847) attained judicial rank in India; [6] and Anstruther (1769-1819),[7] the author of cases decided in the court of Exchequer between 1792 and 1797, became advocate-general at Madras and later recorder of Bombay. He was the first regular reporter of cases in the court of Exchequer,[8] and aimed at producing a set of reports of the decisions in that court, like the parallel series which were already being produced for the other two common law courts.[9] As he pointed out, the decisions upon revenue cases and upon tithe cases, which were usually brought on the equity side of the court, and upon the practice of the court, were of great importance to all lawyers.[10]

The most remarkable and the most scholarly of all the reports of this period are Foster's reports of the trials of the rebels in 1746 in Surrey and of some other Crown cases, which he published in 1762.

Foster (1689-1763) [11] was the son of an attorney who practised at Marlborough. He was a member of Exeter College, Oxford, and was called to the bar by the Middle Temple in 1713. He was made recorder of Bristol in 1735; and it was in that capacity

[1] (1765) Wilmot's Notes 243. [2] Vol. iii 394.
[3] Foss, Judges ix 149-151; D.N.B. [4] D.N.B.
[5] Vol. viii 36-38. [6] Above 116-117. [7] D.N.B.
[8] He says in his preface to vol. i that "it has often occurred to me as an unaccountable circumstance, that while the modern decisions of the other courts in Westminster Hall have been regularly published, no one has taken notes in that of the Exchequer for a similar purpose; and that, since the publication of Bunbury's reports, during the space of more than fifty years, the determinations of that Court have remained wholly unknown to the Profession at large."
[9] Ibid v-vi. [10] Ibid iii-v.
[11] Life by his nephew Michael Dodson; Dodson wrote this life in 1795 for the second edition of the Biographia Britannica; that edition was burnt, but Dodson had the proofs of his life; the life was published from these proofs by John Disney in 1811; Foss, Judges viii 285-287; D.N.B.; Wallace, The Reporters 440-442.

that he demonstrated, in the case of *R. v. Broadfoot*, the legality of the power of the Crown to impress seamen for the navy.[1] He came of a family of Protestant dissenters; and, in the same year that he was made recorder of Bristol, he wrote a small book controverting some of the high ecclesiastical claims put forward by Gibson in his *Codex Juris Ecclesiastici Anglicani*, which passed through several editions.[2] In 1745 he was made a judge of the court of King's Bench—a post which he held till his death in 1763. A letter written by Thurlow in 1758, describing the trial of an indictment against Princess Amelia, the ranger of Richmond Park, for stopping a way, shows that he was an impartial and an independent as well as a learned judge.[3] He was in favour of the proposed legislation to improve the procedure on the writ of Habeas Corpus in civil cases,[4] since he was fully conscious of the oppressions often committed by press gangs.[5] His eminence both as a just judge and a master of Crown law was recognized by his contemporaries.[6] As Foss says,[7] the general impression of his disposition may be collected from the passage in Churchill's *Rosciad:*

> Each judge was true and steady to his trust,
> As Mansfield wise, and as old Foster just.

Both the form and contents of his reports are remarkable. They are remarkable in form because he appended learned notes to the cases, and added four very able discourses on various points of Crown law.[8] From this point of view his book is an anticipation of the plan of collecting a book of leading cases with notes appended, which John William Smith, at the suggestion of Samuel Warren, carried out in 1837-1840. His reports are remarkable in substance by reason of their author's learning, his clarity of expression, and his accuracy of statement.[9] From

[1] (1743) Foster 154; vol. x 381.

[2] "An Examination of the scheme of Church Power laid down in the Codex Juris Ecclesiastici Anglicani"; Dodson, op. cit. 13-17; for Gibson and his book see below 607-610.

[3] Dodson, op. cit. 85-88.

[4] Vol. ix 119-121; vol. xi 375; below 471.

[5] Dodson, op. cit. 52, 60-61.

[6] De Grey C.J., in the case of Brass Crosby (1771) 3 Wils. at p. 203, said that he might "be truly called the *magna charta* of liberty of persons, as well as fortunes"; Blackstone, Comm. iv 2, called him "a very great master of crown law"; and Thurlow alluded to him as "the one English judge whom nothing can tempt or frighten," Dodson, op. cit. 88.

[7] Judges viii 287; in 1763 Horace Walpole wrote, "Sir Michael Foster is dead, a Whig of the old rock," Letters (ed. Toynbee) v 384.

[8] Discourse I, of High Treason; II, of Homicide; III, of Accomplices in High Treason and other Capital Offences; IV, on some passages in the writings of Lord Chief Justice Hale relative to the Principles on which the Revolution and present Happy Establishment are founded.

[9] Foster, in his Preface, criticizes "the hasty indigested things called *Reports of Adjudged Cases* . . . meer fragments of learning, the rummage of dead men's papers, or the first essays of young authors"; these, he says, have been "the bane and scandal of the law considered as a science founded on principle"—"the *ignes fatui* of the profession."

these points of view their merits have been so clearly described by Stephen that I shall copy his words. Stephen says: [1]

> The scope of Foster's work is narrow, but it would be difficult to overrate its merits within the limits which the author has chosen to impose upon himself. He wrote at a time when the number of reported cases was sufficiently great to show where the difficulties of the subject lay, but when there was still room for the improvement of the law by discussions meant to show, not what had as a fact been decided in reported cases, but what it would be reasonable to decide on general grounds.[2] Foster may thus be considered as the last, or nearly the last, author who has done much towards making the law by freely discussing its principles on their merits. Viewed in this light his discourses are admirable. They are perfectly clear, disencumbered of all unnecessary technical details, admirably comprehensive as far as they go, and full of good sense and good feeling. I do not think it would be possible to cite a better illustration of the good side of what has been called judicial legislation. Foster writes as only a perfect master of his profession can write, with a clear firm grasp of its principles, and without encumbering himself with unimportant details.

If, as Stephen says, he is sometimes too technical,[3] this is largely due to the predominant characteristic of the law, and therefore of the legal thought of that age.

The reports made by other lawyers.

Bunbury's reports were published by his son-in-law, serjeant George Wilson. Bunbury had, his editor tells us,[4] "attended Westminster Hall above forty years, chiefly at the Exchequer bar"; and when he retired in 1743 he had for many years been "postman" in that court.[5] His notes of cases had frequently been borrowed and transcribed. In order that an imperfect copy might not be surreptitiously published, the editor published such notes as Bunbury had himself taken and corrected. On one occasion Lord Mansfield said that these reports were very loose notes, not designed for publication.[6] But Mansfield, in

[1] H.C.L. ii 213.

[2] Foster says in his Preface, "I have endeavoured rather to ground myself upon principles of law and sound policy than on the bare authority of former writers; who will frequently be found contradicting each other, and sometimes themselves."

[3] Thus he is one of the authors of the opinion that if a man shoots at a tame fowl with intent to steal it, and accidentally kills a man, he is guilty of murder, but that if he shoots at a wild fowl and accidentally kills a man it is "barely manslaughter"; and "no one laid down more decidedly than he artificial constructions of the statute of treason, or contended more earnestly for their substantial justice," H.C.L. ii 214; see also a letter by Lord Mansfield to Foster protesting against the publication of a dissenting opinion in a certain case which was based solely on technical reasons, cited Wallace, The Reporters 441.

[4] Preface to Bunbury's reports.

[5] That is the senior barrister on the common law side of the court, regularly attending the court; he in that court had the privilege of moving before the law officers and King's counsel, see vol. i 234 n. 4.

[6] Tinkler v. Poole (1771) 5 Burr. at pp. 2658-2659; for the decision in this case, which was not wholly logical, see vol. iii 286 and n. 9.

this as in other cases, was rather too ready to decry a set of reports because they contained a decision which was contrary to his own view of the law in the particular case before the court [1]—a view which was occasionally more remarkable for its novelty than for its strict adherence to precedent.[2] Against Mansfield's condemnation we can set the opinions of Platt and Parke, BB., who recognized these reports as authoritative in 1853.[3] In fact, they were almost the only regular set of reports of cases decided in the court of Exchequer before Anstruther published his reports in 1796.[4] Serjeant George Wilson, Bunbury's editor, has left three volumes of reports, which have always had a very high reputation, since their author was regarded as one of the most learned lawyers of his time.[5] The reports are prefaced by lists of the judges of the courts at Westminster and the counsel who practised before them during the years covered by the reports. Serjeant Thomas Barnardiston,[6] who wrote one volume of reports of cases decided by the court of Chancery, and two volumes of reports of cases decided by the King's Bench, is said by some to have been a very careless reporter. Lord Mansfield [7] and Lord Lyndhurst [8] had a very low opinion of his Chancery reports, and Lord Kenyon of his King's Bench reports.[9] But others have vindicated their character. Lord Eldon, Lord Manners, Sir William Grant, Arden, M.R., Alexander, C.B., Lord Erskine, and Best, C.J, have all spoken well of them.[10] Therefore, as Wallace has said, the adverse judgment which Lord Mansfield and others have passed upon them "may be considered as now largely corrected." [11]

Fitz-Gibbon's reports had a curious history Burrow tells us [12] that they were published in the term after the last reported case—Michaelmas 5 George II; that their author was an Irish student who was called to the bar about the time that the book

[1] Wallace, The Reporters 504-505. [2] Below 152, 553, 555-556.

[3] R. v. Edwards 9 Ex. at pp. 51-52, 53.

[4] Anstruther's Reports, Preface to vol. i.

[5] Wallace, The Reporters 442-443; and see R. v. Edwards (1853) 9 Ex. at p. 52 *per* Platt B.

[6] Wallace, op. cit. 423-426, 514; D.N.B.

[7] "Lord Mansfield absolutely forbade the citing that book: for it would be only misleading students to put them upon reading it. He said it was marvellous to those who knew the Serjeant and his manner of taking notes, that he should so often *stumble* upon what was right: but yet that there was not one case in his book which was so throughout," 2 Burr. at p. 1142 *note*.

[8] Lord Lyndhurst said, "I recollect, in my younger days, it was said of Barnardiston, that he was accustomed to slumber over his note-book, and the wags with him took the opportunity of scribbling nonsense in it," cited Wallace, op. cit. 424. [9] 1 East 642 n. (*a*).

[10] Wallace, op. cit. 425-426, and the references there cited.

[11] Ibid 426.

[12] Burrow's statement, taken from a note in his copy of Fitz-Gibbon, is printed ibid 427-428.

appeared ; and that it was currently reported that the book was published " to satisfy Walthoe, the bookseller, either for chamber rent, or money advanced towards the charges of the author's call to the bar." So hasty a publication of a book of reports by an unknown author caused some professional indignation,[1] which was unfounded ; for Burrow said that, when he compared the cases reported with his own notes, he found that the reports agreed with his own ; and he praised the reporter's work.[2] But his concluding remark that, in spite of the good quality of the reports, " nothing can excuse such a hasty unlicensed publication of the performances of a private note taker without authority or revisal," illustrates the prevailing view as to the qualifications of a reporter, and the manner in which a book of reports should be prepared. The reporter should have an established professional position, he should get the licence or approval of the judges, and he should take time to polish his MS. We have seen that, when Burrow published his own reports, he did not apply for the licence of the judges, and gave good reasons for not making this application.[3] His views had changed between the time when he wrote this note and the time when he published his reports ; and the introduction by the editors of the Term Reports of the contemporaneous publication of reports got rid of the objection that reports should not be so hastily published.[4] Fitz-Gibbon returned to Ireland and was called to the Irish bar, where he made good his position.[5] His son became the famous Lord Chancellor of Ireland, and first Earl of Clare.[6]

William Kelyng is the author of a volume of Select Cases in the Chancery and the King's Bench which was published anonymously in 1740. A second edition, with seventy additional cases, was published in 1764.[7] George Andrew's reports of cases in the King's Bench have a good reputation, and they reached a second edition in 1792.[8] Capel Lofft, man of letters, country gentleman, and Whig politician, was called to the bar in 1775, and in 1776 published his reports of cases decided in the court of King's Bench and Chancery between the years 1772 and 1774.[9] To the book was appended a wordy preface, and at the end the author printed a collection of 652 Latin maxims, to which he

[1] Above 112.

[2] " There are, indeed, errors in it ; but upon the whole the cases seem to be clearly stated, the arguments of different counsel at different times, clearly, forcibly, and yet briefly represented, and the sense of the court truly delivered. In short, there does not appear to me any want of accuracy, perspicuity, or judgment."

[3] Above 112-113. [4] Above 116. [5] Wallace, op. cit. 429.

[6] Vol. xi 33. [7] Wallace, op. cit. 431.

[8] Ibid 439-440—Marvin, in his Legal Bibliography, called the book " accurate, judicious, and satisfactory."

[9] Ibid 452 ; D.N.B.

prefixed a Latin preface. The reports are not of very great authority—Park, J., in 1821 said that, though they filled the gap between the ending of Burrow and the beginning of Cowper, he had never heard them quoted three times in his life.[1] But Lofft's reports are not without value, if only for the reason that he is the only reporter of *Sommersett's Case* sub nomine *Somerset v. Stewart.*[2] Henry Blackstone, the nephew of William Blackstone, became the regular reporter in the court of Common Pleas, and published in 1791 and 1796 two volumes of reports of cases decided in that court between the years 1788 and 1796.

Of the reporters of cases decided in the court of Chancery, and on the equity side of the Exchequer, the only one of judicial rank is Chief Baron Gilbert (1674-1726).[3] He was called to the bar in 1698. In 1715 he was made a puisne judge of the court of King's Bench in Ireland, and later in the year was made Chief Baron of the Exchequer in Ireland. While holding that office he became involved in the constitutional controversy as to the jurisdiction of the English House of Lords over Ireland, which was raised by the case of *Annesley v. Sherlock.*[4] The Irish court of Exchequer obeyed the orders of the English House of Lords to put Annesley in the possession of lands, which the Irish House of Lords had adjudged to Sherlock. Gilbert and the other members of the court were committed to prison by the Irish House of Lords. In 1722 Gilbert resigned his office in Ireland and was made a baron of the English court of Exchequer. In 1725 he acted as one of the commissioners of the great seal, and in the same year he was made Chief Baron of the Exchequer. But he only held that post for fifteen months. He died October 14, 1726.

Gilbert was a mathematician as well as a lawyer, and a fellow of the Royal Society. But it is his legal works, none of which was published in his lifetime or with the consent of his representatives,[5] which have made his name famous. We shall see that they comprise treatises on several of the courts, and on many topics of law and equity, both substantive and adjective ;[6] and that part of his work was used by Mathew Bacon in the preparation of his Abridgment.[7] These works are some of the best text-books on legal topics published during this century. Two of them won high praise from Blackstone,[8] and many of them have

[1] Smith v. Doe d. Earl of Jersey (1821) 2 Brod. and Bing. at p. 536.
[2] At pp. 1-19. [3] Foss, Judges viii 31-33 ; D.N.B.
[4] Vol. i 371-372 ; vol. xi 26, 28, 31.
[5] Viner, in the Preface to vol. xix of his Abridgment, says : " Nor could I ever find that any one Book ascribed to his Lordship was ever published by the previous consent of any Person entitled to give it " ; for the numeration of the vols. of Viner's Abridgment in the first and later editions see below 165 n. 2.
[6] Below 182-183, 186-188, 352, 355, 366, 369-371.
[7] Below 169-170. [8] Below 352, 367.

passed through several editions. Gilbert's work as a reporter consists of two sets of reports. One, which was published in 1734,[1] is entitled "Reports of Cases in Equity argued and decreed in the Courts of Chancery and Exchequer chiefly in the reign of King George I, to which are added some Select Cases in Equity heard and determined by the Court of Exchequer in Ireland." [2] The book was published anonymously, but, as Viner has said, no one doubted that Gilbert was its author.[3] The other volume, which was published in 1760,[4] is entitled "Cases in Law and Equity, argued, debated, and adjudged in the King's Bench and Chancery, in the twelfth and thirteenth years of Queen Anne, during the time of Lord Chief Justice Parker." To the reports, which deal only with cases in the court of King's Bench, there are added two treatises—one on the action of debt, and the other on the constitution of England. Gilbert did not personally report all these cases. Some of the cases in the former volume were taken from a Collection of Precedents in Chancery,[5] the MS. of which is said to have been stolen from Gilbert's representatives ; [6] and some of the cases in the latter volume were taken from Peere Williams.[7]

In 1794 Ridgeway, an Irish barrister, published a collection of Lord Hardwicke's decisions as Chief Justice of the King's Bench between the years 1733 and 1737, and his decisions as Chancellor between 1744 and 1746. The cases were taken from a large MS. volume which had been purchased by the attorney-general from a barrister of some eminence named Joshua Davis. The MS. contained cases decided in the time of Lee, C.J. ; and the editor tells us that he had been commissioned by the attorney-general to select from the MS. and publish the cases decided by Lord Hardwicke.[8] He added marginal notes, verified the references, and added other references to modern cases.[9] The book contains an approximately equal number of Lord Hardwicke's decisions as Chief Justice of the King's Bench and his decisions as Chancellor.[10] It would

[1] There was a second edition of 1742.

[2] Wallace, The Reporters 502-503.

[3] Viner, Preface to vol. xviii of the Abridgment, says : "That the *Reports of Cases in Equity* came out of his Lordship's Study is most certain ; that the Copy thereof was purchased by one of the Patentees of a Person who had no Right or Authority to dispose of it is equally certain ; and I have very good Reason to think, that had his Lordship been living, he would no more have consented to its Publication than did his Representative, who (as I have been told) exhibited a Bill in Chancery against the Publisher."

[4] Wallace, op. cit. 417-418.

[5] Ibid 503, citing Viner, Ab. v. 408 *Condition* B § 19 note.

[6] Ibid 497 ; vol. vi 618 ; Viner, Ab. Preface to the vol. of the Ab. which begins with *Prohibition*.

[7] Wallace, The Reporters 418. [8] Preface. [9] Ibid.

[10] Wallace, The Reporters 434, 514.

seem that Leach used the same MS. in his edition of the Modern Reports.[1] The cases decided in the court of King's Bench, which he added to the seventh volume of those reports, are very similar in phrasing and sequence to the cases reported in these volumes.[2] Dickens, the registrar of the court of Chancery, left a collection of reports which cover the long period from 1559 to 1798.[3] They were edited and published after his death by Wyatt. Lord Eldon testified to Dickens's knowledge of the practice of the court ;[4] and the cases reported by him, in which the court gave decisions as to practice which were founded upon his suggestions, have been said to be particularly authoritative.[5] On the other hand, some of his notes of cases were rather loose, and it was said by Lord Redesdale that it was always necessary to verify them by a reference to the registrar's books.[6] Peere Williams, whose reports of cases in the court of Chancery were published by his son, was, it has been said, "the first full and clear reporter of Chancery cases."[7] Two volumes of his reports were published in 1740, and a third volume in 1749. The reason why some of the cases were not published till a later date was the necessity for further revision, and the fact that, in some cases, it was necessary to supply the final decision from the registrar's books.[8] The value of these reports has been much increased by the labours of Samuel Compton Cox, the reporter of a set of Chancery cases.[9] He added learned notes to the cases, which showed how the law had developed since the reporter's day.[10]

Mosely's reports[11] of cases decided during the time of Lord Chancellor King was a posthumous publication by an anonymous editor. Lord Mansfield somewhat hastily condemned them ;[12] but Lord Eldon stated that he differed from Lord Mansfield and praised their accuracy.[13] They were also praised by Hargrave.[14] Cases *tempore* Talbot were for the most part reported by Alexander Forrester, an equity barrister of some eminence, who is responsible for other reports long after the time

[1] For Leach's edition of the Modern Reports see vol. vi 557.
[2] Wallace, The Reporters 434. [3] Ibid 476-477.
[4] Norway v. Rowe (1812) 19 Ves. at p. 153.
[5] Fisher v. Fisher (1847) 2 Ph. at pp. 240-241, *per* Lord Cottenham L.C.
[6] Smith v. The Hibernian Mine Co. (1803) 1 Sch. and Lef. at p. 240.
[7] Wallace, The Reporters 499.
[8] Preface to Vol. 3. [9] Below 144.
[10] In the case of Woods v. Huntingford (1796) 3 Ves. at p. 130 Pepper Arden M.R. said of Cox's note to the case of Evelyn v. Evelyn 2 P. Wms. 664 that "he has there stated the rules respecting this question so accurately and shortly, and so well extracted the principles from all the cases . . . that I would rather refer to his words than use my own."
[11] Wallace, op. cit. 504-505.
[12] Quantock v. England (1770) 5 Burr. at p. 2629.
[13] Mills v. Farmer (1815) 1 Mer. at p. 92 ; cp. 2 Swanst. 195 note.
[14] Wallace, op. cit. 505.

of Talbot.[1] It would seem that the first edition was published without the author's consent, since Forrester got an injunction in 1741, the year the book was published, to restrain the publication of his notes, which had been "gotten surreptitiously without his consent."[2] Charles Ambler, K.C., attorney-general to the Queen, had, according to Lord Eldon, "a very considerable knowledge of the decisions of his own time."[3] But his reports in their original form never had a high reputation for accuracy in their statements of law or of fact.[4] They were much improved in Blunt's edition which was published in 1828.[5] John Tracy was the maternal grandson of Atkyns, C.B.,[6] and he assumed the name of Atkyns.[7] He was called to the bar in 1732, and became cursitor baron of the Exchequer in 1755. From 1736 to 1754 he had taken notes of cases in the court of Chancery which he published in 1765, 1767, and 1768. Some of his reports have been criticized;[8] but in the later edition by F. W. Sanders they are much improved.[9] In his first volume Atkyns arranged his cases under alphabetical headings after the manner of an abridgment, in order, he said, to make his book "a digest or system of equity";[10] but in the two succeeding volumes he abandoned this plan. It had not been approved of by the profession, and the labour of thus digesting the cases had delayed the publication of the reports.[11]

Vesey senior reported cases in the court of Chancery between the years 1746-1755. His reports were revised and corrected by his editor, Belt, who also published a supplemental volume containing corrections, references to the registrar's books and to other earlier and later reports, and some additional cases.[12] Vesey junior reported the decisions of the court from 1789-1816. His reports err on the side of elaboration and length; but an allegation that the modern equity reports, as compared with the

[1] Wallace, op. cit. 507-508; Hovenden, in his notes to Vesey Junior's reports, used Forrester's MSS. which had been acquired from Campbell, late accountant-general of the court of Chancery, Preface to vol. i of the notes ix-x.

[2] 4 Burr. at p. 2331.

[3] Clarke v. Parker (1812) 19 Ves. at p. 12; Ambler tells us in his Preface that he had "practised as a barrister for upwards of forty years, of which thirty were employed in the court of Chancery, under five Lord Chancellors, three sets of Commissioners and five Masters of the Rolls."

[4] Wallace, The Reporters 513; they were very adversely criticized by Eden in his Preface to vol. i of his reports of the decisions of Lord Northington.

[5] Wallace, op. cit. 514.

[6] For Atkyns C.B. see vol. vi 515-516.

[7] Foss, Judges viii 238-239; D.N.B.

[8] In La Vie v. Philips (1766) 1 W. Bl. at p. 571 the court refused to allow Atkyns to be cited as an authority; and in Olive v. Smith (1813) 5 Taunt. at p. 64 Mansfield C.J. said that his reports were very inaccurate.

[9] Wallace, The Reporters 512.

[10] Preface to vol. 1.

[11] Preface to vol. 2.

[12] Wallace, The Reporters 515; for the pecuniary assistance which Eldon gave to Belt see below 145-146.

earlier reports, were too elaborate and lengthy, he answered with some success in the Preface to the second edition of his reports. Robert Henley Eden, commissioner of bankrupts, master in Chancery, and second baron Henley, published in 1818 the decisions given by his maternal grandfather, Lord Northington, between the years 1757 and 1766.[1] The main source from which the reports were taken was Lord Northington's own MSS., which contained statements of the facts of the cases and the arguments of counsel, and the reasons for the decisions, sometimes in a short note and sometimes at length.[2] Eden corrected and supplemented these MSS. by references to the MSS. of serjeant Hill, Coxe, and Hargrave; and he collated all the cases with the registrar's books, and the books of the secretary of bankrupts. He also added notes to illustrate the development of the doctrines discussed in some of the reported cases.[3] Northington's reputation as a lawyer was considerably raised by the publication of these reports. Samuel Compton Cox, one of the masters of the court of Chancery and the learned editor of Peere Williams's reports,[4] published two volumes of Chancery cases decided between the years 1783 and 1796, together with a few cases decided by Lords Hardwicke and Northington.[5] These reports are accurate, learned, and concise.[6]

Of Equity Cases abridged, which partakes of the nature of a set of reports by reason of the fullness with which some of the cases are set out, and of the nature of an abridgment by reason of the alphabetical arrangement of its contents, I shall speak in the next section which deals with the abridgments.[7]

I have already said something of the principal reporters in the court of Admiralty and the ecclesiastical courts.[8] Of the

[1] D.N.B.; Wallace, The Reporters 516-517.

[2] The MSS. consisted of six volumes of note-books and loose papers; "The note books contain the statements of the facts, and the arguments of counsel, as taken down by his Lordship with great diligence and minuteness. In cases reserved for consideration, the reasons of his determination are generally inserted at the conclusion of the argument. In others of still greater difficulty . . . the judgments are found written out at length on separate papers; and they were probably read in court in the same state in which they now appear. Where less deliberation was necessary, and his opinion was given at the time of the argument, a short note is often added of the grounds upon which it was founded, and the reasons which he adduced in support of it," Preface ix-x.

[3] Ibid x-xiii.

[4] Above 142.

[5] Wallace, The Reporters 517-518; Cox says in his Preface that the cases decided by Lords Hardwicke and Northington "are, in general, such as have been cited or alluded to from the Bench or the Bar in the course of the argument of the principal cases: they are stated from notes on which the author conceives he may safely rely, with the assistance of a reference to the Register's books."

[6] Eden, in the Preface to his reports of Lord Northington's decisions xii-xiii, says that he had tried "to follow the example of Mr. Cox, both in method, arrangement, and brevity, and trusts that he may have succeeded in resembling him in fidelity and accuracy."

[7] Below 171-172; cp. vol. vi 614-619.

[8] Above 105-107.

career of Lee [1] (1700-1758), the younger brother of Lee, C. J., I shall speak later. We have seen that his reports, which are taken from his note-books, were edited and published by Phillimore in 1833.[2] Christopher Robinson (1766-1833),[3] the reporter of cases in the court of Admiralty, succeeded Stowell as Chancellor of the diocese of London, and judge of the consistory court in 1821, and as judge of the court of Admiralty in 1828. Haggard (1794-1856),[4] the reporter of cases both in the court of Admiralty and in the ecclesiastical courts, was Chancellor of the dioceses of Lincoln, Winchester, and Manchester.

The reports of this period are, on the whole, superior to the reports of the preceding period. By the end of this period the objects at which a law reporter should aim, and the rules which he should follow, were generally recognized. And though there are some unsatisfactory reports of cases both in the common law courts and in the court of Chancery, their deficiencies have often been, to a large extent, corrected in later and improved editions. The publication of these improved editions is more especially a feature of the older reports of cases decided in the court of Chancery;[5] and Wallace is probably right when he ascribes this fact to the influence of Lord Eldon:

> His Lordship's veneration for precedent, and the deferential spirit of enquiry which marked his mind, not less than its self-dependence and creative power, led counsel at his bar constantly to search the Registrar's books for cases reported in print. And a taste for this research was thus generated and has grown up in England, with the happiest effects upon modern jurisprudence.[6]

And Lord Eldon sometimes gave more direct and material assistance. Twiss relates the following story of the publication of Belt's work on the reports of Vesey senior:[7]

> Mr. Belt, a gentleman of the Chancery bar, happened to mention in Lord Eldon's hearing, that he had prepared with great labour some notes on the Reports of the elder Vesey. "You should publish them," said the Chancellor. "My Lord," replied Mr. Belt, "I have offered them to the booksellers; but they will not take the risk of printing, and I cannot afford it myself." "The notes ought not to be lost," rejoined Lord Eldon; "let me know what the printing would cost." On learning the probable expense, which was estimated at £200, Lord

[1] Wallace, The Reporters 521-522; below 666-669.
[2] Above 106-107. [3] D.N.B. [4] D.N.B.; above 106.
[5] "Cary, Tothill, Freeman, Vernon, the Cases temp. Talbot, Peere Williams, Atkyns, Ambler, Vesey Senior, and Brown have all within the time of Lord Eldon been presented anew to the profession; while the reports of Lord Kenyon, Mr. West, Mr. Ridgeway, Mr. Cox, Mr. Eden, and Mr. Swanston give to us, now for the first time, decisions made generations ago," Wallace, The Reporters 512; for Swanston's reports of Lord Nottingham's decisions from the Nottingham MSS. see vol. vi 542, 619.
[6] Wallace, The Reporters 512. [7] Horace Twiss, Life of Eldon iii 483.

Eldon sent Mr. Belt a check for that amount. The work was successful; and when it had repaid its expenses, Mr. Belt came to Lord Eldon, and proposed to repay him the £200. "No, no, Mr. Belt," said the Chancellor, "I wish to have the pleasure of making your work a present to the profession."

(4) *The establishment of the modern theory as to the authority of decided cases.*

The modern theory as to the authority of decided cases was reached substantially by the second half of the eighteenth century.[1] I have already dealt with the historical causes which led to the adoption of that theory.[2] At this point I shall say something of the process by which it attained its modern form. If we look at its modern form, it appears, at first sight, to be a simple theory. A decided case makes law for future cases, and will bind all inferior courts, and generally courts of co-ordinate jurisdiction. But the more closely the theory is examined the less simple does it appear. Let us look at two statements of that theory. (i) One of the ablest books on this subject, entitled *The Science of Legal Judgment*, was published by James Ram in 1834. Ram states the theory in this way: [3]

A case decided is called a precedent, and is an authority, which, under many circumstances, binds a court to make the same decision in a future similar case.

(ii) Sir Frederick Pollock thus states the modern rule: [4]

The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely

[1] Dr. C. K. Allen, Law in the Making (2nd ed.) 150-151, says that the modern theory "is certainly a product of the nineteenth century"; I do not agree with this statement; I think that the modern theory was reached a good deal earlier; I think that the authorities cited below, 149-150, show that Dr. Allen is wrong in saying (L.Q.R. li 333-334) that in the eighteenth century precedent was regarded merely as evidence of the rules of law; Dr. Allen in his Law in the Making has not sufficiently observed the distinction between the general theory, and the reservations with which that theory has been and is accepted; with those reservations I deal below, 150-157; it is true that the character and force of those reservations have differed from age to age, and that some judges have at all periods attached more weight to some of them than other judges; but these facts do not affect the truth of the view that, subject to these reservations, they accepted the modern theory.

[2] Vol. ii 326, 541-542; vol. iii 654-655; vol. v 372-373; Professor Goodhart is quite right when he points to the cessation of the influence of Roman Law at the end of the thirteenth century as the reason which led to the making of reports, and eventually to the modern English theory of the binding force of decided cases, see L.Q.R. l. 61-62; cp. vol. ii 326-327; as Mr. Gardner has pointed out (Judicial Precedent in Scots Law 19-20, 78-81, 90-91) both France and Scotland show that the extent to which the law depends on a body of *lex scripta* determines the extent to which case law is accepted; thus in France, so long as the Code of 1804 sufficed for ordinary needs, no body of case law arose, but "the need to adjust the 1804 Code to the requirements of present-day society" has led to the growth of a body of case law; this is to some extent true of Scots law, but here the influence of English law must be reckoned with, ibid 28-31; vol. xi 17-20.

[3] At p. 112.

[4] A First Book of Jurisprudence (1st ed.) 299-300.

binding on courts of co-ordinate authority nor on that court itself, will be followed in the absence of strong reasons to the contrary. The decisions of a Court of Appeal are binding on all courts of co-ordinate rank with the court below, and generally, according to English practice, on the Appellate Court itself.

These are guarded statements. The first says that "under many circumstances" a decision is authoritative. The second tells us that in the case of a co-ordinate court, appellate or otherwise, a decision will be followed "in the absence of strong reasons to the contrary" or that it is "generally" binding. It is clear that, if we would understand the modern theory as to the authority of decided cases, we must try to discover the meaning, not only of the rule that a decided case is an authority for deciding a similar case, but also of the qualifications of that rule which make it necessary to use such terms as "under many circumstances," or "in the absence of strong reasons to the contrary," or "generally." We can only discover the meaning of the rule and its qualifications if we examine the way in which the modern theory was developed during the sixteenth, seventeenth, and eighteenth centuries.

We have seen that in the later Year Books cases were cited and distinguished somewhat in the manner in which they were cited and distinguished in later law.[1] They were regarded as precedents of some authority. If they had not been regarded as being of some authority, it would be difficult to see of what value the Year-Books would have been to the legal profession.[2] But we have seen that the modern theory as to the authority of decided cases could not begin to be developed till the changes made at the end of the fifteenth and the beginning of the sixteenth century in the system of pleading concentrated the reporter's attention, not upon the oral debate in court as to what the pleading should be and what issue should be reached, but upon the decision of the court upon an issue reached by the written pleadings of the parties before the case had come into court.[3] We have seen that it was the change in the style of law reporting, which followed upon this transition from the system of oral to the system of written pleadings, which made the growth of the modern theory as to the authority of decided

[1] Vol. ii 541-542; see T. Ellis Lewis's papers on The History of Judicial Precedent L.Q.R. xlvi 215-224, 326-360, xlvii 411-427; cp. Dr. C. K. Allen, Law in the Making (2nd ed.) 131-140; Case Law L.Q.R. li 333-346. I think that Professor Winfield minimizes too much the part played by precedent during the period of the later Year Books in his Sources of English Legal History 148-157.

[2] Thus Prisot C.J. said, Y.B. 33 Hy. VI Mich. pl. 17 (at p. 41), "Et Sir si ce serra or adjuge nul plee, come vous tenes, vraiment ce serra mal ensample aus juvenes apprentices que sont studients en Termes: car ils ne unques voillont doner credence a lour livres, si tiel jugement que ad este aussi moults fois ajuge en lour livres sera or ajuge le contrary."

[3] Vol. iii 654-655; vol. v 371-373.

cases possible ; [1] and that, therefore, in the latter half of the sixteenth and at the beginning of the seventeenth centuries the general rule that decided cases were authoritative was recognized in the courts of law,[2] in the court of Chancery,[3] and in the court of Star Chamber.[4] In fact from the sixteenth to the nineteenth century a chain of authority can be cited for this general rule.

In the early seventeenth century Bacon said : " decided cases are the anchors of the laws, as laws are of the state." [5] " Our Booke Cases," said Coke,[6] " are the best proofes what the law is . . . Booke Cases are principally to be cited for deciding of cases in question, and not any private opinion, teste meipso " ; and the multitude of citations of cases in his reports and other writings shows that he believed in this statement.[7] This view is also taken by Hobart and Jenkins in their reports.[8] It is true that, in the latter half of the seventeenth century, Vaughan, C.J., after distinguishing mere *obiter dicta* from opinions necessary to the decision, and therefore truly judicial,[9] says that another court is not bound to follow a judicial opinion if it thinks that the judgment given was not according to law.[10] But Hale,[11] writing at the same period, though he admits that the courts cannot

> make a law properly so-called ; for that only the King and Parliament can do ; yet they have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is, especially

[1] Vol. v 372-373. [2] Ibid. [3] Ibid 275-276.

[4] Ibid 162-164 ; Coke, Fourth Instit. 64, records a case where " the presidents of this court were to be searched ; for except presidents could make a difference between this court and others, the defendant could not be sentenced."

[5] " Judicia enim anchora legum sunt, ut leges reipublicae," De Augmentis Bk. viii Aph. 73.

[6] Co. Litt. 254*a* ; cp. also f. 81*b*.

[7] Gray, Nature and Sources of Law § 459, says, " the contrast between all or any of the earlier reporters and Lord Coke is enormous, for with Lord Coke the citation of cases reached a height which it has never equalled since."

[8] See the case cited by Dr. C. K. Allen, Law in the Making (2nd ed.) 143-144 ; I doubt whether the distinction there drawn between precedents in matters of pleading and procedure, and in other cases, is really important—decisions on these matters often involved a decision as to the substantive law.

[9] " An extra judicial opinion given in, or out of Court, is no more than the prolatum or saying of him who gives it. . . . An opinion given in Court, if not necessary to the judgment given of record, but that it might have been as well given if no such, or a contrary, opinion had been broach'd, is no judicial opinion ; but a mere gratis dictum. But an opinion, though erroneous, concluding to judgment, is a judicial opinion, because delivered under the sanction of the Judges oath," Bole v. Horton (1673) Vaughan at p. 382.

[10] " If a Court give judgment judicially, another court is not bound to give like judgment, unless it think that judgment first given was according to law. For any Court may err. . . . Therefore, if a Judge conceives a judgment given in another Court to be erroneous, he being sworn to judge according to law, that is, in his own conscience, ought not to give the like judgment, for that were to wrong every man having a like cause, because another was wrong'd before," ibid at p. 383.

[11] Hist. of the Common Law (6th ed.) 90.

when such decisions hold a consonancy and congruity with resolutions and decisions of former times, and though such decisions are less than a law, yet they are a greater evidence thereof than the opinion of any private persons as such whatsoever. First, because the persons who pronounce those decisions are men chosen by the king for that employment, as being of greater learning, knowledge, and experience in the laws than others. Secondly, because they are upon their oaths to judge according to the laws of the kingdom. Thirdly, because they have the best helps to inform their judgments. Fourthly, because they do, *sedere pro tribunali*, and their judgments are strengthened and upheld by the laws of this kingdom, till they are by the same law reversed or avoided.

In the eighteenth century it was realised that the distinction which Hale drew between a law properly so called, and a decision which, for the reasons he gives, is a very strong evidence of law, was a little thin. In 1704 Thomas Wood, comparing English with Roman law, said that "precedents and adjudg'd cases have been preserved for many ages, to direct in the determination of most points; so that an arbitrary judge has less room to exert himself here than in any other Law."[1] In 1754 Lord Hardwicke said,[2] "I think authorities established are so many laws; and receding from them unsettles property: and uncertainty is the unavoidable consequence." This was in substance the view of Blackstone.[3] It is true that he admits that a decision which is contrary to reason or divine law cannot stand[4]—we have seen that he even denied the validity of a statute which was contrary to divine law.[5] But he states the general rule to be that the judges must "abide by former precedents when the same points come again in litigation"—otherwise there would be no certainty in the law;[6] and he minimizes the force of his admission that a decision contrary to reason or divine law cannot stand, by saying that "even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation."[7] Precedents must, he says, be followed unless "flatly absurd and unjust";[8] and that is so even if they appear unjust to us, if they lay down settled law and are

[1] A New Institute of the Imperial or Civil Law, Preface.

[2] Ellis v. Smith (1754) 1 Ves. at p. 17. [3] Comm. i 69-71.

[4] Ibid 69-70; this was also stated by Hobbes, Leviathan f. 143, cited by C. K. Allen, Law in the Making 146, and was really a commonplace in an age which believed in the overriding force of the divine law or the law of nature, see vol. vi 290-291, 293-294.

[5] Vol. x 529-530.

[6] "As well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land," Comm. i 69.

[7] Ibid 70. [8] Ibid.

not repugnant to natural justice ; [1] for " they are the evidence of what is common law." [2] The binding force of precedents is, as we shall see, admitted by Lord Mansfield ; [3] and it is stated clearly and strongly by Douglas in the preface to his reports.[4] In 1803 Lord Eldon followed cases of which he did not wholly approve because " it is better the law should be certain than that every judge should speculate on improvements in it." [5] In 1832 Lord Tenterden, C.J., said, " the decisions of our predecessors, the judges of former times, ought to be followed and adopted, unless we can see very clearly that they are erroneous, for otherwise there will be no certainty in the administration of the law." [6]

The general rule is clear. Decided cases which lay down a rule of law are authoritative and must be followed. But in very many of the statements of this general rule there are reservations of different kinds. Let us look at these reservations which have been made by the judges at different periods, and at their practical results ; for, unless we realize their importance, we can neither understand the nature of the authority which decided cases have in our modern law, nor estimate the truth of the criticisms which have been passed upon this mode of developing a legal system.

The fundamental principle, upon which all these reservations ultimately rest, is the principle stated by Coke, Hale and Blackstone, that these cases do not make law, but are only the best evidence of what the law is. They are not, as Hale said, " law properly so called," [7] but only very strong evidence of the law. They are evidence, as Coke said, of the existence of those usages which go to make up the common law ; and, conversely, the fact that no case can be produced to prove the existence of an alleged usage is evidence that there is no such usage.[8] This

[1] Comm. i 70-71.

[2] " Upon the whole we may take it as a general rule, that the decisions of courts of justice are the evidence of what is common law : in the same manner as in the civil law, what the emperor had once determined was to serve for a guide for the future," ibid 71.

[3] Below 152-153, 555.

[4] " It has been found expedient to entrust to the wisdom and experience of judges the power of deducing, from the more general propositions of law, such necessary corollaries, as shall appear, though not expressed in words, to be within their intent and meaning. Deductions thus formed and established in the adjudication of particular causes, become in a manner part of the text of the law. Succeeding judges receive them as such, and, in general consider themselves as bound to adhere to them no less strictly than to the express dictates of the legislature," Preface iii-iv.

[5] Sheddon v. Goodrich (1803) 8 Ves. at p. 497.

[6] Selby v. Bardons (1832) 3 B. and Ad. at p. 17.

[7] Above 148.

[8] " Hereby it appeareth how safe it is to be guided by judiciale presidents, the rule being good, *Periculosum existimo quod bonorum virorum non comprobatur exemplo.* And as usage is a good interpreter of Lawes, so now usage when there

principle is the natural, though undesigned, result of the unofficial character of the reports; and it is clear that its adoption gives the courts power to mould as they please the conditions in which they will accept a decided case or a series of decided cases as authoritative. If the cases are only evidence of what the law is the courts must decide what weight is to be attached to this evidence in different sets of circumstances. The manner in which they have decided this question has left them many means of escape from the necessity of literal obedience to the general rule that decided cases must always be followed. They have allowed many exceptions to, and modifications of, this rule if, in their opinion, a literal obedience to it would produce either technical departures from established principles, or substantial inconveniences which would be contrary to public policy.

First, Coke is never tired of insisting that the fact that a rule would lead to inconvenient results—inconvenient either technically or substantially—is a good argument to prove that that rule is not law.[1] The principles of the common law must be maintained "even though a private man suffer losse";[2] and so firmly did he believe this thesis that we have seen that he even said that these principles could not be overriden by an Act of Parliament.[3] Obviously, according to this view, only those cases could be regarded as authoritative which were in accordance with these principles. Coke, as usual, stated this principle in an exaggerated form. It was quite clear that no one really believed, not even Coke himself, that the principles of the common law could control an Act of Parliament;[4] and it was clear that, if the authority of decided cases could be disregarded whenever the judge thought that substantial inconvenience could be caused by following them, very little authority could be attached to them—a conclusion which was contrary both to Coke's theory and to his practice. Vaughan, C.J., pointed out that "where the law is known and clear, though it be unequitable and inconvenient, the judges must determine as the law is, without regarding the unequitableness or inconveniency";[5] and that "if inconveniences necessarily follow out

is no example is a great intendment, that the Law will not bear it," Co. Litt. 81 b; Coke then points out that no "Act of Parliament by non-user can be antiquated or lose his force."

[1] "Here note three things. First, that whatsoever is against the rule of Law is inconvenient. Secondly, that an argument *ab inconvenienti* is strong to prove it is against Law. . . . Thirdly, that new inventions . . . are full of inconvenience," Co. Litt. 379*a*; cp. ibid 66*a*, 152*b*, 178*a*, 258*b*, 279*a*.

[2] Ibid 152*b*; "it is better, saith the law, to suffer a mischiefe (that is peculiar to one) than an inconvenience that may prejudice many," ibid 97*b*.

[3] Bonham's Case (1609) 8 Co. Rep. 107, 118; vol. ii 442; vol. iv 186-187.

[4] Vol. ii 442; vol. iv 187; vol. v 475.

[5] Dixon *v.* Harrison (1670) Vaughan at p. 37.

of the law only the Parliament can cure them." [1] It followed from this view that the authority of decided cases must be respected, even though the judge thought they led to inequitable and inconvenient results. It is true that Vaughan, C.J., gives the judges a larger latitude than they possess to-day, or probably than they possessed then, of refusing to follow a judgment which they considered to be erroneous.[2] But we must remember that the judges have always assumed the power to disregard cases which are plainly absurd or contrary to principle, and that they have a free hand if authority is wanting, or if the authorities are conflicting.

Blackstone admits that the judges have the power to disregard cases which are absurd or contrary to principle ; [3] Parke, B., makes a similar admission ; [4] and the power has been used in modern times.[5] The only question is the extent of this power. Lord Mansfield preferred to follow principle rather than precedent ; [6] and it was mainly by an appeal to principle that he justified his attempts to reform the doctrine of consideration [7] and the law of quasi-contract,[8] to effect a fusion between law and equity,[9] and to rationalize the doctrine of seisin.[10] But he recognized the expediency of maintaining the authority of decided cases,[11] even of cases which turned on the construction of

[1] " Judges must judge according as the law is, not as it ought to be. But then the premisses must be clear out of the established law, and the conclusion well deduc'd before great inconveniences be admitted for law. But if the inconveniences necessarily follow out of the law, only the Parliament can cure them," Craw v. Ramsey (1670) Vaughan at p. 285.

[2] Above 148 n. 10. [3] Above 149.

[4] " Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents ; and for the sake of obtaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise ; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised," Mirehouse v. Rennell (1833) 1 Cl. and Fin. at p. 546.

[5] Drummond v. Drummond (1866) L.R. 2 Eq. at p. 339, where previous cases decided in ignorance of a statute were disregarded ; Collins v. Lewis (1869) L.R. 8 Eq. 708, where Stuart V.C. declined to follow what was clearly a mistaken decision ; and see Farquharson v. Floyer (1876) 3 C.D. 109, where Collins v. Lewis was followed ; *In re* Lechmere and Lloyd (1881) 18 C.D. 524 Jessel M.R. refused to follow a decision of Hall V.C. because he thought that it had been decided on a wrong principle ; *In re* Cattell [1914] 1 Ch. at p. 187 Lord Parker for the same reason refused to follow certain decisions on the Thelusson Act ; and see also the decision of Luxmoore J. in *In re* Caus [1934] 1 Ch. 162.

[6] " The law does not consist in particular cases ; but in general principles, which run through the cases, and govern the decision of them," Rust v. Cooper (1777) 2 Cowp. at p. 632 ; cp. Fisher v. Prince (1762) 3 Burr. at p. 1364 ; Jones v. Randall (1774) 1 Cowp. at p. 39.

[7] Vol. viii 26-34. [8] Below 542-547.

[9] Below 557-558, 584-589. [10] Vol. vii 43-44 ; below 515, 553, 557.

[11] There is a report of his speech in the House of Lords in the case of Bishop of London v. Ffytche in Cunningham's book on Simony ; at p. 173 he said, " it was of vast importance *stare decisis :* no man could but perceive the mischief of a

wills,[1] and the expediency of following them. In many cases he followed them, even when he disapproved of them.[2] In fact, the failure of his attempts to effect large reforms in the law by his decisions showed that this power to disregard decisions was a power which could only be exercised within a much narrower compass; for it was the weight of the decided cases which secured that failure, by proving that the principles which he wished to apply were not law.[3] The modern cases show, as Parke, B., pointed out,[4] that it can only be used if a rule laid down by a case is "plainly unreasonable and inconvenient"—that is, if it is obviously contrary to a statute or to well-established principle.[5] It is obvious that if a case arises which is covered by no authority, a recourse must be had to principles. In such a case Lord Mansfield would have attached comparatively little weight to precedents which might suggest an analogy;[6] but Parke, B., attached much greater weight to them;[7] and his is now the accepted view. Similarly, if the cases are conflicting, it is open to the judge to choose between them and to adopt the rule which he considers to be just.[8]

contrary practice; it was an object of the utmost importance to that judicature for many reasons. In the first place because they were under no control: in the next place, if a wrong rule of law had crept in, they could rectify it in their legislative capacity"; in the case of Robinson v. Bland (1760) 1 W. Bl. at p. 264 he said, "when an error is established, and has taken root, upon which any rule of property depends, it ought to be adhered to by the judges, till the Legislature thinks proper to alter it."

[1] "In the construction of wills, adjudged cases may very properly be argued from, if they establish general rules of construction to find out the intention of the testator," Hayward v. Whitby (1757) 1 Burr. at p. 233; though the intent must govern, yet "where by the authorities a certain construction has been established, the court is equally bound, in cases exactly similar to adhere to that construction," Pistol v. Riccardson (1784) 3 Dougl. at p. 366.

[2] O'Neil v. Marson (1771) 5 Burr. at p. 2814; Bayntun v. Walton (1774) 1 Cowp. at p. 191-192; Hodgson v. Ambrose (1780) 1 Dougl. at pp. 340-341; Bishop of London v. Ffytche (1782) 3 Dougl. at p. 146.

[3] Vol. vii 44; vol. viii 34-35; below 515, 518. [4] Above 152 n. 4.

[5] Lord Hanworth, in his life of Pollock C.B. 198, prints a letter from the Chief Baron in which he says: "The common law of England is really nothing more than 'summa ratio'—*the highest good sense*—even Parke, Lord Wensleydale (the greatest legal pedant that I believe ever existed), did not always follow even the House of Lords; he did not *overrule*—(Oh no! μη γενοίτο) but he did not *act upon* cases which were *nonsense* (as many are)."

[6] "The law would be a strange science if it rested solely upon cases; and if after so large an increase of commerce, arts, and circumstances accruing, we must go to the time of Rich. I. to find a case and see what is law. Precedent indeed may serve to fix principles, which for certainty's sake are not suffered to be shaken, whatever might be the weight of the principle, independent of precedent. But precedent, though it be evidence of law, is not law itself; much less the whole of the law," Jones v. Randall (1774) Lofft at p. 385; for a less pointed version of this dictum see 1 Cowp. at p. 39.

[7] Above 152 n. 4.

[8] Lord Mansfield said, in the case of Pugh v. Duke of Leeds (1777) 2 Cowp. at p. 718, "I will consider this case upon the authorities. I have arranged all the cases that have been determined in Westminster Hall in order of time; and when I come to state them, you will be surprised to see they stand so little in the way, as

Secondly, in the eighteenth century, because the reports were made by private reporters, the reports of decided cases possessed, as we have seen,[1] very different degrees of authority. It was always possible for a judge who was trying a case to decry the authority of a report which laid down a rule with which he disagreed. We have seen that Lord Mansfield, when he was pressed by a case which laid down a rule which he did not like, was rather too apt to take this line.[2] It is no doubt a line which it became less possible to take as the reports improved in quality, and as reporting became more standardized and more stereotyped. But within limits this censorship of reports is both legitimate and necessary.[3] For, after all, what is authoritative is not the report, but, so far as it goes,[4] the record.[5] The reports, as Blackstone said, only "serve as indexes to, and also to explain, the records; which always in matters of consequence and nicety the judges direct to be searched."[6] For this reason a report can, as Sir Frederick Pollock has said, "always be contradicted by a more accurate report or even by the clear recollection of the Court or counsel, though this does not often happen."[7]

Thirdly, though the English legal system was a very centralized system, though, for the most part, only the decisions of the central courts of law and equity were reported,[8] yet,

binding authorities, against justice, reason, and common sense. All they show is the great uncertainty of the meaning, and the impossibility of putting an absolute sense to hold good in all cases; they are themselves so many contradictions backwards and forwards."

[1] Above 130-145. [2] Above 137-138.

[3] Thus in the case of Chillingworth v. Esche [1924] 1 Ch. at pp. 112-113 Warrington L.J. said, "there are one or two points raised by Mr. Micklem with which I think I ought to deal. He relies on Moeser v. Wisker ((1871) L.R. 6 C.P. 120). In my opinion that is a case which never ought to have been reported. It was an *ex parte* application. The judges seized on a single fact, and decided on that fact. The purchaser in that case had no opportunity of stating his view."

[4] As Douglas points out in the preface to his reports p. v, though the record is indisputable so far as it goes, it does not go far; and "since the most material parts of the case cannot be gathered from the record," recourse must be had to the reports, so that it is upon their fidelity and accuracy that "the evidence of a very great part of the law of England entirely depends"; it was because the record omitted some of the most essential parts of the case that the writ of error, which lay only for errors on the record, became comparatively useless, vol. i 215-216, 223-224.

[5] There are some sound remarks on the relation of the report to the record in Wynne, Eunomus iii 179-181. [6] Comm. i 71, and see ibid 69.

[7] Essays in the Law 233; cp. Ram, The Science of Legal Judgment 7.

[8] The practice of reporting the decisions of the itinerant justices began late and was soon discontinued; the reports of their decisions begin with Peake (1790-1794), and end with Foster and Finlason (1858-1865); cp. Pollock, A First Book of Jurisprudence 322-323. When the new county courts were established in 1846 English lawyers showed their instinctive sense of one of the main conditions for the success of a system of case law by abstaining from reporting their decisions; for, as Bacon pointed out, De Augmentis Bk. viii c. 3 Aph. 78, "nihil tam interest certitudinis legum . . . quam ut scripta authentica intra fines moderatos coerceantur, et facessat mult tudo enormis authorum et doctorum in juri; unde laceratur sententia legum, judex fit attonitus, processus immortales, atque advocatus ipse, cum tot libros perlegere et vincere non possit, compendia sectatur."

before the Judicature Act, there was a considerable number of these courts. There were the three courts of common law, there were the courts held by the judges of assize, there was the court of Exchequer Chamber, the court of Chancery, and the House of Lords. The cases decided by these courts were sometimes conflicting, and the weight to be attached to their decisions was different. Wynne, writing in 1774, said : [1]

> If I was to form a *Scale*, by which the authority of legal precedents might be measured, the precedents *sub silentio* would obtain the lowest place : next above these . . . I consider an opinion of a single judge at *nisi prius*, on a point directly in question : then, higher up the scale, the determination of any one court in Westminster Hall : much higher than this, that very determination confirmed by another court on writ of error : and the highest of all, the determination of the same case, on a writ of error in the House of Lords. This last has the highest place imaginable in the scale of Judicature ; and affords evidence of common law, or the exposition of an Act of Parliament, in no way inferior, in point of authenticity, to the express positive text of an Act of Parliament itself.

It was, therefore, by no means clear that a previous decision given by one of these courts might not be reversed, if the same or a different court at a later date thought that some other line of authority ought to be followed. The position in 1834 was thus summed up by Ram : [2]

> (1) Modern cases in Bank stand in opposition to each other. . . . (2) Modern cases at *nisi prius* stand in opposition to each other. . . . (3) One decision in Bank does not always bind the courts to make the same decision in Bank on similar circumstances in another case : one such decision is often overruled by another. (4) One decision at *nisi prius* does not bind the courts to make the same decision at *nisi prius* on similar circumstances in another case : often one such decision overrules another. (5) Consequently, one decision at *nisi prius* does not so settle the point decided, as to exclude all hope of a different result on a second *nisi prius* trial of the like question. (6) The same is true of two or more cases decided at *nisi prius*. (7) One case decided in Bank does not so settle the point decided, as to exclude all hope of a different result on a second case in Bank on the like question. (8) The same is true of two or more cases decided in Bank.

In fact the three independent courts of common law, like the Proculians and Sabinians in Roman law, sometimes followed different rules on certain matters.[3] The Judicature Act, by abolishing these separate courts and substituting a High Court

[1] Eunomus iii 192-193. [2] The Science of Legal Judgment 6-7.

[3] Thus in the sixteenth century, and till the decision in Slade's Case in 1602 (4 Co. Rep. 92*b*), the courts of Common Pleas and Queen's Bench took different views on the question whether assumpsit could be brought for a debt without an express subsequent promise, vol. iii 443-444 ; in the nineteenth century there was a difference of opinion between the courts of Exchequer and Queen's Bench as to the kind of misrepresentation which would support an action for deceit, Smith, Leading Cases (10th ed.) ii 81-83.

split up into Divisions, and a court of Appeal, has got rid of the principal cause of those divergencies. But it is still not quite certain how far judges of the High Court are obliged to follow each other's decisions;[1] and quite recently conflicting decisions have been given by the court of Criminal Appeal[2] and the court of Appeal.[3]

Fourthly, Bacon pointed out that

> it is a sound precept not to take the law from the rules, but to make the rule from the existing law. For the proof is not to be sought from the words of the rule, as if it were the text of law. The rule, like the magnetic needle, points at the law, but does not settle it.[4]

This truth was emphasized by Lord Hardwicke when he said that "neither law nor equity consists merely of casual precedents, but of general rules and principles by the reason of which the several cases coming before the courts of justice are to be governed;[5] and by Parker, C.B., when he said that "the law of England is not confined to particular precedents and cases but consists in the reason of them, *ratio legis est anima legis* and *ubi eadem est ratio idem est jus* are known maxims."[6] Lord Mansfield[7] and Jessel, M.R.,[8] agreed with them; and this principle has been reasserted by Sir Frederick Pollock who says:[9]

> Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles

[1] Above 152 n. 5. [2] R. v. Denyer [1926] 2 K.B. 258.

[3] Hardie v. Chilton [1928] 2 K.B. 306; though the correctness of R. v. Denyer was denied in this case, Lord Hewart C.J. later stated that, for the purpose of the administration of the criminal law, R. v. Denyer would be followed till reversed "by the only competent tribunal" in the House of Lords, L.Q.R. xliv 436.

[4] "Recte jubetur, ut non ex regulis jus summatur, sed ex juri quod est, regula fiat. Neque enim ex verbis regulae petenda est probatio, ac si esset textus legis. Regula enim legem (ut acus nautica polos) indicat, non statuit," De Augmentis Bk. viii c. 3 Aph. 85—The translation is Spedding's.

[5] Gorton v. Hancock Harg. MSS. 353 f. 122 cited P. C. Yorke, Life of Hardwicke ii 492; in Ellis v. Smith (1754) 1 Ves. at p. 17 he is reported to have denied a dictum of Bacon cited at the bar, and said that "many uniform decisions ought to have weight that the law may be known"; if Bacon's dictum was the dictum cited above, this statement is not directly contradictory to it, and the dictum in Gorton v. Hancock agrees with its spirit.

[6] Omichund v. Barker (1748) 2 Eq. Cases Ab. 401; cp. a similar statement by Pepper Arden MR. in Thellusson v. Woodford (1799) 4 Ves. at p. 332.

[7] "There is no cause of greater ambiguity, than arguing from cases without distinguishing accurately the grounds upon which they were determined," R. v. Clark (1777) Cowp. at p. 612; "The law does not consist of particular cases, but of general principles, which are illustrated and explained by those cases," R. v. Bembridge (1783) 3 Dougl. at p. 332.

[8] "The only thing in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided; but it is not sufficient that the case should have been decided on a principle if that principle is not itself a right principle, or one not applicable to the case; and it is for a subsequent judge to say whether or not it is a right principle, and, if not, he may himself lay down the true principle," Osborne to Rowlett (1880) 13 C.D. at p. 785.

[9] Continental Law in the Nineteenth Century (Continental Legal History Series) xliv.

recognised and applied as necessary grounds of the decision. Therefore it has never been possible for the courts to impose dogmatic formulas on the Common Law, and the efforts of text writers to bind it in fetters of verbal definition have been constantly and for the most part happily frustrated by the reconsideration and restatement of guiding principles in the judgments of the highest tribunals.[1]

It is with these reservations that English law accepts the authority of decided cases.[2] Both the general rule that decided cases are authoritative, and the reservations with which that rule is accompanied, are due historically to the very gradual way in which our modern theory as to the authority of decided cases was developed. As the result of that evolution English lawyers have invented a wholly original method of developing law. It is a method of developing law which preserves the continuity of legal doctrine, and is at the same time eminently adaptable to the needs of a changing society.[3] As I have pointed out in an earlier volume, Coke's Reports restated the mediæval common law, and adapted it to the needs of the seventeenth century;[4] Mansfield's decisions did a similar work for the common law in the eighteenth century;[5] and in the nineteenth century a succession of eminent judges adapted to the needs of that century of change, the law of the seventeenth and eighteenth centuries. Such a method of developing law could only have been invented by a learned self-governing profession, responsible only to itself. It was the leaders of this profession who made or employed the men who made the Year Books. It was they who, in a later age, made the reports. It was they who applied to these reports an intelligent criticism, which has established a professional tradition as to which of these reports are good, which bad, which indifferent. It was they who worked out in theory and applied in practice the general rule that decided cases are authoritative, the reservations to that general rule, and more especially the principle that the authority of a decision is attached, neither to the words used, nor to all the reasons given, but to the principle or principles necessary for the decision of the case. But even such a profession could not have developed this method of

[1] For an instance of the beneficial effect of such reconsideration and restatement see Heilbert Symons and Co. v. Buckleton [1913] A.C. 30.

[2] I think the authorities cited above 152 n. 5, 154 nn. 3 and 7, 156 and n. 8, 157 n. 1, disprove Professor Goodhart's statement (L.Q.R. l 198) that "the four reservations so effective in the eighteenth and the beginning of the nineteenth century are no longer recognized at the present time."

[3] Burke said, "Nothing better could be devised by human wisdom than argued judgments publicly delivered, for preserving unbroken the great traditionary body of the law, and for marking . . . every variation in the application and the construction of particular parts," Report (April 30, 1794) of a Committee of the House of Commons on the proceedings in the trial of Warren Hastings, Works (Bohn's ed.) vi 453.

[4] Vol. v 489.

[5] Below 560.

developing law if the courts had not been staffed by an independent bench of judges, sufficiently well paid to secure that they were, as a general rule, more able than the bar. It is true that barristers have sometimes exercised some kind of censorship over the cases which they have reported.[1] But it is the criticisms of the bench, and the use made by the bench of prior decisions, upon which the success of a system of case law in the long run depends. A system of appointing judges which does not secure both the presence of the ablest lawyers on the bench, and security of tenure, will never be able to operate successfully our English system of case law.

No doubt this system of case law has its defects; and Bentham and Austin, who looked at the legal phenomena of their day merely analytically, and therefore superficially, exercised their ingenuity in stressing its imperfections. Bentham's contemptuous description of it is well known:

> It is the judges that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it and then beat him. This is the way you make laws for your dog, and this is the way the judges make laws for you and me.[2]

Austin emphasized the difficulty of extracting the *ratio decidendi*, the fact that case law is made in haste, its *ex post facto* character, its bulk, the uncertainty as to the validity of many of its rules, its fragmentary character, its tendency to make the statute law unsystematic.[3] It is impossible to deny the truth of some of these criticisms. But I think that an undue emphasis is laid upon them by the manner in which the analytical jurists treat case law, not as one of the means, and one of the means only, by which English law has been developed, but as an isolated phenomenon. If we look at the various sources of English law we see that, though case law is a principal source, it is not the only source, and that the existence of other sources of that law, such as books of authority and statutes, has gone some way to diminish some of the defects emphasized by this school of jurists.

In more recent times an insufficient attention to the many reservations with which the theory of the binding force of decided cases is received, has led some comparative lawyers to depreciate unduly this method of developing a legal system as

[1] For instance Campbell; Atlay, The Victorian Chancellors ii 138, says, "Campbell was no mere stenographer; he exercised an absolute discretion as to what decisions he reported and what he suppressed, and sternly rejected any which appeared to him inconsistent with former rulings or recognised principles. He jocularly took credit for helping to establish the Chief Justice's reputation as a lawyer, and he used to boast that he had, in one of his drawers, material for an additional volume in the shape of 'bad Ellenborough law'."

[2] Truth versus Ashhurst, Works v 235.

[3] Austin, Jurisprudence (3rd ed.) ii 671-682.

compared with the continental method,[1] which attaches binding force, not to the decision of individual cases, but, to use a French term, to a "jurisprudence," that is to "a series or group of cases creating a practice."[2] Let us examine some of their criticisms.

It is said that the English method of developing a legal system makes for greater rigidity than the continental method —the custom declared to be law by a decided case is for ever fixed and cannot, as under the continental practice, be varied as the custom varies.[3] The answer to this criticism is that the English method has the merit of making the custom and therefore the law more certain.[4] If inconvenience arises in the future the Legislature can easily see the exact point requiring remedy, and can therefore easily make a law to fit the new circumstances. It is said, again, that the English method is too conservative, and that we want a better reason for a rule of law than the fact that it was approved by our ancestors.[5] But the history both of Roman and of English law shows us that an element of conservatism is needed for the construction of "a durable system of jurisprudence";[6] and the reservations with which the English system of case law is received[7] enable the judges, within fairly wide limits, to apply to old precedents a process of selection and rejection which brings the law into conformity with modern conditions. Mr. Justice Holmes has truly said that

> it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[8]

But, in fact, the process of selection and rejection has been applied to the law laid down in the Year Books;[9] and generally the rules there laid down, which are still part of modern law, have survived because they suit modern needs. It is not, I

[1] See Professor Goodhart's paper on Precedent in English and Continental Law, L.Q.R. l 40-65.

[2] Ibid 42.

[3] "In so far as the English method does succeed in incorporating custom into law it is obvious that it must be the custom which existed at the time of the precedent case, which under the Continental procedure the practice of the Courts may change as the popular custom changes," ibid 46.

[4] Dr. Allen denies this, ibid li 335; but he relies on particular cases of uncertainty; no one would claim that case law makes the law wholly certain; but if we remember that it is the certain rules made by case law which have been the foundation of such codifying Acts as the Bills of Exchange Act and the Sale of Goods Act we can see that cases have made a large amount of very certain law; see ibid 442.

[5] Ibid l 47-49.

[6] Maine, Ancient Law 75-76.

[7] Above 150-157.

[8] Collected Legal Papers 187.

[9] Especially by Coke, vol. v 490, and the process has continued from his day to our own.

think, true to say that the English method of developing law by means of decided cases makes the law unpractical, because it is based, not on a series of experiments, but on single authoritative cases which preclude further experiments.[1] The reservations with which the English method is accompanied [2] provide opportunities for further experiments.[3] It is true to say that this method keeps the law in touch with life, and prevents much unprofitable speculation upon academic problems, which serves only to illustrate the ingenuity of the speculator. I think, in fact, that it is true to say that it hits the golden mean between too much flexibility and too much rigidity; for it gives to the legal system the rigidity which it must have if it is to possess a definite body of principles, and the flexibility which it must have if it is to adapt itself to the needs of a changing society.[4] If it gives less flexibility than the continental system, it also gives more certainty; and it is generally less rigid than the enacted law. If we compare the mediæval common law with the law of the sixteenth and seventeenth centuries, and the law of the sixteenth and seventeenth centuries with the law of the nineteenth and twentieth centuries, this flexibility is apparent; and it is not difficult to see that this result is the consequence both of the English system of case law and of the reservations with which that system is applied in practice. It is true that the application of that system makes the law bulky and technical, and it is true that it imposes upon the lawyers a high degree of technical skill.[5] But is that too high a price to pay for the benefits of a legal system which combines the virtues of certainty and flexibility in such a way that it has been found capable of continuous adaptation to the needs of successive ages;

[1] Professor Goodhart says, L.Q.R. l 50: "A system of law to be truly practical must be one based on a series of experiments, tested by trial and error; this, however, is not the method of English law, for owing to the doctrine of precedent, the first experiment must also be the last. In contrast to this, the Continental practice in fact is based upon experience, for *la jurisprudence* only becomes fixed if the result of the cases shows that a rule, heretofore tentatively applied, is a desirable one. There is, therefore, room for a certain amount of judicial experimentation which is impossible under the common law."

[2] Above 150-157.

[3] Professor Williston, Some Modern Tendencies in the Law 125, cited L.Q.R. l 54, says, "uniform decisions of three hundred years on a particular question may, and sometimes have been overthrown in a day, and the single decision at the end of the series may establish a rule of law at variance with all that has gone before"; a good illustration of this fact is the case of Bourne v. Keane [1919] A.C. 815.

[4] If we remember that the continuity of the doctrines of English law during many centuries, and throughout vast changes in political, social and economic conditions, is largely due to our system of case law, above 157, it seems absurd to deny, as Dr. Allen does, L.Q.R. li 336-337, that case law has no measure of flexibility; no doubt case law does sometimes result in rigid and inconvenient rules; but, taking the theory of case law with its reservations, and looking at the way in which it has, with the help of the Legislature, kept the law in touch with the needs of the day, its flexibility is more remarkable than its occasional rigidity.

[5] Ibid l 47-48.

of a legal system which has enabled the lawyers to construct a body of scientific doctrine which is matched only by that constructed by the classical jurists of Rome? I agree with Dr. Allen when he says [1] that the weaknesses of our system of case law "do not outweigh its substantial merits"; and that "the amount of irrationality introduced into the law by certain inevitable difficulties of application is inconsiderable beside the solid and rational jurisprudence which the Common Law, built up on example and analogy, has erected to so high a position in European civilization."

The study of comparative law is a very valuable study which is necessary both to students of legal history and of modern law. But it has its pitfalls. One of these pitfalls is the risk that it may lead us to depreciate unduly our own law and our own legal institutions. If the student of foreign law and foreign legal institutions has a close and practical acquaintance with the working of his own law and legal institutions, which make him painfully aware of their defects, and merely an academic knowledge of foreign law and foreign legal institutions, he will be apt to stress the weak points of his own law and legal institutions, and magnify the strong points of the foreign laws and institutions of which his knowledge is more distant and theoretical. If his knowledge of his own law and institutions is equally distant and theoretical he will necessarily judge both by reference only to their appearance on paper, and will praise or condemn on merely theoretical grounds, which will often leave out of sight the real strength and weakness of both. In the sixteenth century Starkey thought that the best cure for the defects of English law would be a reception of the Roman civil law; but it is clear that his knowledge of the civil law was of the bookish, academic kind, which overlooked the fact that in practice the laws of those countries which had received the Roman civil law, suffered from defects quite as great as those from which English law suffered.[2] It seems to me that to-day some of the critics of our system of case law, and some of the critics of our English judicial system and of our jury system, have made a mistake similar to that made by Starkey in the sixteenth century.[3] They pass over the strong points of their

[1] Law in the Making (2nd ed.) 205. [2] Vol. iv 259-260.

[3] This it seems to me is the weak side of Mr. Ensor's instructive little book on Courts and Judges in France, Germany and England; thus at p. 8 he undervalues the advantage of an appeal court which is nation-wide and not regional; and at p. 9 he refuses to admit that there is any advantage in a jury trial in civil cases; similarly, in his anxiety for the ease of the litigant, he refuses to take due account of the advantage to the law which is afforded by the appellate jurisdiction of the House of Lords; the fact that the English judge is not constantly looking for promotion is not, as he seems to think, the only or the most important reason why the quality of justice he dispenses is so good; there is more to be said in favour of

own law and institutions almost in silence, and they stress the weak points. They condemn too strongly the apparent anomalies of their own system, and they praise too strongly the apparent logic and neatness of continental systems. To make a perfectly fair comparison it is necessary to have a thorough and first-hand knowledge of the practical working of all the systems which are compared. But it is as rare to possess a thorough first-hand knowledge of the practical working of two legal systems as it is to be perfectly bilingual. Consequently, those who make these comparisons without this intimate knowledge are often unconscious of the fact that the imitation of foreign examples which they advocate may result in changing the inconveniences which they know of for the greater inconveniences from which the virtues of our own laws and institutions have saved them.

But we must return to the case law of the eighteenth century. We have seen that for two of the greatest defects of our system of case law—the defects of bulk and want of system—the lawyers had found a partial remedy in the Abridgments.[1] We must now consider the development of this literature of Abridgments in the eighteenth and following centuries.

The Abridgments

We have seen that Rolle's Abridgment marks a new epoch in the history of Abridgments, and that it was a model to the makers of Abridgments in the late seventeenth and early eighteenth centuries.[2] His Abridgment influenced Hughes's Abridgment,[3] Nelson's Abridgment of the common law,[3] which is said to have been largely copied from Hughes,[4] and Giles Jacob's Common Law Common-placed.[5] Nelson's book was inaccurate,[6] and Jacob's book was intended for students.[7] A more substantial work was undertaken in the early years of the eighteenth century by Knight D'Anvers.[8] He set out to trans-

the circuit system than he admits; and his denunciation of the unpaid magistracy rests mainly on a few and comparatively rare hard cases.

[1] Vol. ii 543-545; vol. v 376-378; vol. vi 496, 601.

[2] Vol. v 376. [3] Ibid 377.

[4] "Having occasionally examined Mr. Hughes's [I] find him in a manner wholly transcribed by Mr. Nelson, sometimes with little or no variation, and if any it is by way of disguise only, sometimes exchanging one error for another, supplying very few imperfections, correcting as few mistakes found in his original, and sometimes by mistaking Mr. Hughes, making some errors where none were before," Viner, Ab. Preface to vol. xiii; for the numeration of Viner's volumes see below 165 n. 2.

[5] J. D. Cowley, A Bibliography of Abridgments (S.S.) lvii.

[6] Above n. 4. [7] J. D. Cowley, op. cit. lvii.

[8] Ibid lvi-lvii; Viner says, Pref. to vol. xix, that though Holt C.J. refused to sign the imprimatur to D'Anvers' book, he afterwards thought so well of it that he "not only made Mr. Danvers a personal compliment from the bench in open court, but left him an annuity of £20 for his life."

late Rolle's Abridgment and to bring it up to date. In 1705 and 1713 two volumes of this Abridgment down to the title "Entry" were published. In 1727 the title "Error" was printed as a supplement to vol. ii, and in 1737 the supplement was continued as far as the title "Extinguishment." D'Anvers tells us in the preface to his first volume that he had made Rolle's Abridgment the basis of his commonplace book; and that, when he had decided to publish his work, he had at first intended to print the abstracts of Rolle's entries which he had made for this commonplace book.

> But considering that the manner of my Lord Roll's abridging cases had been universally approved, and the danger of omitting often material circumstances, if I endeavoured to be more concise, and believing the whole would be more useful if Roll's was included and preserved entire, I resolved upon a literal translation thereof into English.

Therefore the whole of Rolle was included "with his several titles, folio, and placita." The part thus taken from Rolle was printed in Gothic, and his own additions in Roman character. Viner admired D'Anvers' work, which he calls "curious and exact."[1] He intended his work to be merely a supplement to D'Anvers;[2] and we shall see that the existence of D'Anvers' work determined the order in which his own volumes were published.[3] But the rate at which D'Anvers published his volumes was very slow; and after the lapse of thirty-two years from the publication of the first volume, and thirty-nine years from the date when it was begun, it had only been completed down to the letter E.[4] Therefore in the earlier half of the eighteenth century there was room for a new Abridgment which should embody the results of the modern cases.

This want Viner determined to supply. His Abridgment is the last and longest of the Abridgments in the direct line of descent from Rolle. It is in the direct line of descent, for it was greatly influenced by D'Anvers which was to a large extent a translation of Rolle;[5] and, like D'Anvers' work, it was founded upon Rolle, whose work, more especially on the mediæval law, Viner agreed with D'Anvers in admiring.[6]

[1] Preface to vol. xiii.

[2] "At length I resolved to revise what I had before gone thro' with, and Mr. Danvers second volume being then come abroad, laid it down as a rule to examine, whatever came in my way, with Mr. Danvers, so far as he had gone, and to enter nothing in my own which I found in him, intending my own only as a supplement to his, or his only as a supplement to my own collections," ibid.

[3] Below 165. [4] Viner, Pref. to vol. ix.

[5] Above 162-163; below 164-165.

[6] "My Lord Roll, whose Abridgment is my text, has supplied the greatest part thereof out of the Year Books, those rich mines of the law, and out of which those other great men Lord Fitzherbert and Brooke drew so much valuable ore,

Charles Viner,[1] the son of a woollen draper of Salisbury, was born at Salisbury in 1678. He matriculated at Hart Hall on February 19, 1695, but left Oxford without taking a degree.[2] On November 27, 1700, he was admitted a member of the Middle Temple, but was never called to the bar.[3] On February 9, 1727, he was admitted a member of the Inner Temple; and on May 31, 1728, he was admitted to Chambers at No. 3 (South) King's Bench Walk, which he held till June 12, 1752.[4] Till that date he resided either there or at his house at Aldershot. In 1699 or 1700 he married Raleigh, daughter of Philippa and Oliver Weekes of Tortington, Sussex. He died June 5, 1756.[5] He was a man of independent means;[6] and he devoted both his time and his money to promoting the study of English law —in his lifetime by composing and publishing his great Abridgment, and after his death by the establishment of the Vinerian chair and Vinerian scholars.[7]

Viner had formed the resolution of making a complete Abridgment of English law at the time when he was a student at the Middle Temple.[8] But the appearance of D'Anvers' Abridgment and ill-health led him to lay aside his resolution for some years; and when he began to revise his work he at first used his own work to supplement that of D'Anvers.[9] When Nelson's Abridgment came out he treated it in the same way; but he soon found that, as compared with D'Anvers's, Nelson's was a poor piece of work.[10] It was not till after 1727, when a supplement to the second volume of D'Anvers' Abridgment containing the title "Error" appeared, that he seriously thought

which afterwards Lord Coke, in his Institutes, melted into ingots, and which, with some little refining and purifying, have since become the current and precious coin of the common law," Pref. to vol. xiii; this is a very just appreciation of Coke's work, see vol. v 489-490.

[1] See Mr. Strickland Gibson's account of Viner and his Abridgment, in vol. ii of the Proceedings and Papers of the Oxford Bibliographical Society; cp. my own paper in L.Q.R. xxxix 20-23, 35-36; Mr. Strickland Gibson has given an account of the printing of the Abridgment; he has also printed the correspondence relating to it, Viner's Prefaces to several volumes of the Abridgment, his advertisements to some of the volumes, and a concordance between the numbering of the volumes in the original edition and in the completed work.

[2] Foster, Alumni, Early Series: Strickland Gibson op. cit. 229.

[3] Hutchinson, A Catalogue of Notable Middle Templars 251.

[4] The sub-librarian of the Inner Temple has very kindly verified the facts as to Viner's membership of the Inner Temple and the position of his chambers; see Calendar of Inner Temple Records iv 176, 183.

[5] Strickland Gibson, op. cit. 229.

[6] "The love of money I have always been a stranger to, and I thank God I never knew the want of it," Pref. to vol. xviii of the Ab.

[7] Above 92-94.

[8] "The commencement of this work was with the present century, at which time I was admitted a member of the Honourable Society of the Middle Temple, and attended, as a student the courts at Westminster," Preface to vol. xiii of the Ab.

[9] Ibid; above 163 n. 2.

[10] Above 162 n. 4.

of transcribing and publishing his work;[1] and the existence of the unfinished Abridgment of D'Anvers determined the order in which he published his volumes. He began at the letter "F" because D'Anvers had finished his work down to the end of the letter "E" in 1737.[2] His first volume was published in 1741; and the succeeding nine volumes to the end of the alphabet were published between 1742 and 1745. Between 1746 and 1756 he completed and finished the printing of twelve more volumes containing the titles between the letters "A" and "E"; and he completed and partly finished the printing of an index volume to the whole work, which thus consisted of twenty-three volumes.[3]

It is one thing to compile a book of this size: it is quite another to get it published. In the first place, it was necessary to come to an agreement with the law patentees, that is with the booksellers who had got the royal licence to print statutes.[4] As their action against the Cambridge University Press showed,[5] they would certainly have taken action, legal or otherwise,[6] against an author who infringed their patent by publishing statutes in an abridged form. In the second place, it was difficult to find a publisher for a work of these dimensions. D'Anvers' unfinished Abridgment had not been a success;[7] and there were already several Abridgments on the market in which the law publishers had an interest. Viner ultimately came to an agreement with the law patentees; and, since the publishers

[1] "Having never entertained any thoughts of making publick my own collections, till after the coming out of Mr. Nelson's, and the title (Error) of Mr. Danvers's," Pref. to vol. xiii of the Ab.

[2] The volumes were originally issued in the following order: (1) Factor—Funeral Charges; (2) Game—Judgment; (3) Judicial—Nosmes; (4) Not Guilty—Prerogative; (5) Prerogative—Prohibition; (6) Prohibition—Replevin; (7) Replevin—Steward; (8) Stocks—Trespass; (9) Trial—Union of England and Scotland; (10) University—Year Day and Waste; (11) Abatement—Actions; (12) Actions—Appendant; (13) Appendant—Bailiff; (14) Bailiff—Common; (15) Common—Conusance of Pleas; (16) Conusance of Pleas—Court; (17) Court—Descent; (18) Descent—Dismes; (19) Dismes—Error; (20) Error—Execution; (21) Execution—Extraparochial; (22) Evidence; (23) Indices; when the work was complete vol. 11 became vol. 1, and so on throughout the alphabet.

[3] See the advertisement of his executors in the University Archives printed App. I (2). The last dated volume, vol. 20, Error—Execution, is dated 1753; the two succeeding volumes have no date. But it would seem from the advertisement and the note at the end of the indices that vol. 21 was published before Viner's death, and that vol. 22 and the indices were published in 1757. The note at the end of the indices is misleading when it speaks of re-publication in 1757; the only changes made were the removal of the dates on the title-pages, of a somewhat querulous preface to vol. 1 (vol. 11 in the original issue), and of an advertisement to vol. 18 (vol. 7 in the original issue).

[4] Vol. xi 302, 303.

[5] Ibid 302.

[6] Mr. Strickland Gibson, op. cit. 235 tells us that "a publisher named Walthoe had tried the experiment of printing a law book without coming to terms with the patentees, with the result that they printed his book, sold it at prime cost, and spoilt his sale."

[7] Above 163; cp. the Preface to Viner's vol. 18.

would not offer him more than £500 for the work,[1] he resolved to become his own publisher. The work was printed at his own expense, and published in unbound parts at 25s. a volume at his own house in Aldershot, on paper specially manufactured for the purpose.[2] It was no wonder that the undertaking was considered to be, as he says, "somewhat romantick."[3] It was no wonder that it was ridiculed by some of the law publishers, because it diminished their profits, exposed them to risk of loss, and decreased the sale of the Abridgments in which they had an interest.[4] And it was natural that a man who had always lived a retired life, who considered that he had spent his time and his money in conferring upon his country the important service of facilitating the study of the law, should be unduly sensitive to ridicule and criticism.[5] He exaggerated the importance of the ridicule, and quite erroneously thought that the booksellers and printers were leagued together to oppress him and other authors. He was frightened, not altogether without reason, of a rumour that the Irish booksellers intended to pirate his work and sell it at a lower price.[6] He had got the *imprimatur* of the judges. This practice was, as we have seen, a meaningless survival from the time when the licensing Act was in force.[7] But this fact was not then generally recognized;[8] and Viner

[1] This is stated in a letter or memo. in Viner's hand-writing in the University Archives; it is undated, but internal evidence shows that it was written after 1748.

[2] For the history of the printing of the work see Strickland Gibson, op. cit. 236-244; the printer employed in 1737 was Nutt, who was unsatisfactory, and, Viner, having come to terms with the patentees, a new printer, William Lee, was employed in 1740.

[3] Preface to vol. 18.

[4] George Faulkner, the publisher of the Dublin Journal, in a letter to Viner dated Feb. 6, 1749, said that the booksellers of London "loudly complain against you for making slaves of them, and allowing them no profit for goods that they are obliged to give long credit for, and perhaps for some that they will never be paid for. Have you not, as they say, the profits of an Author, a Printer, a Bookseller, and a Banquier?", University Archives, printed by Strickland Gibson, op. cit 303.

[5] Thus Worrall wrote in the 1746 edition of his law catalogue: "As an apology why I have not fixed the price, I beg leave to acquaint the reader that Mr. Viner prints his Abridgment at his own expence, at his dwelling house at Aldershott near Farnham in Hampshire, and sells them in his chambers in the King's Bench Walks, allowing those booksellers who sell his books the advantage of bringing customers to their shop for profit; and if a bookseller is not pleased with this, he is thought an enemy to the work, and may disoblige either his customer or Mr. Viner," Strickland Gibson, op. cit. 241; Viner's remark on this statement in the suppressed preface to vol. 1 was, "As to *Mr. Worrall's Peevish Advertisement* in his last Law Catalogue, relating to this work, it is scarcely worth taking any notice of, it being *Silly, And* much the more so, as it is *False to his own knowledge*"; it was false as allowances were made to the trade, Strickland Gibson, op. cit. 239; another illustration of Viner's touchiness is to be found in an abusive letter about his counsel in a Chancery suit who had referred to Viner as "The Abridgment man," cited L.Q.R. xxxix 22 n. 5, and Strickland Gibson, op. cit. 230.

[6] Strickland Gibson, op. cit. 297-298; this sort of piracy had been frequently committed, though in this case the story was probably not true, see ibid 241-243.

[7] Above 112-113. [8] Above 112, 139.

thought that this *imprimatur* should have silenced the ridicule and criticism of the booksellers.[1]

It is impossible not to admire the industry and perseverance with which Viner devoted his life to making as good and perfect a statement of English law as he was able—" I never knew," he truly said,[2] " what it was not to be in earnest in whatever I undertook." His work was not wholly wasted. The Abridgment had a considerable success. The first edition was nearly all disposed of within two years of Viner's death ; [3] a gentleman of Lincoln's Inn, possibly Robert Kelham, attorney, antiquary and student of Domesday Book, published a concordance of Abridgments in 1578, " chiefly calculated to facilitate the references to the General Abridgment of law and equity by Charles Viner Esqre " ; [4] a second edition appeared between the years 1791 and 1794 ; and a supplement in six volumes was published between the years 1799 and 1806.[5] Viner's book was no doubt, as Hargrave said,[6] a " useful compilation," and one which helped " to facilitate the use of the immense body of law and equity." Its greatest defect was the faithfulness with which Viner had followed the scheme of Rolle's Abridgment. As Hargrave pointed out, a scheme which was well enough suited to a book in two, was not well suited to a book in twenty-two volumes.[7] But the fact that its success was not greater was due to another cause. The style of abridgment-making introduced by Rolle [8] had been worked out ; and, when Viner was composing his Abridgment on this model, he was following a method which was rapidly becoming obsolete. A new epoch in the history of abridgment-making had begun ; and it is for this

[1] " The Imprimatur or Allocatur of the judges to my work is to be laid as it were under an embargo till they [the law booksellers] have signed and countersigned a passport," Preface to vol. 18.

[2] Ibid.

[3] It would seem from the list of subscribers in the index volume that some 400 copies were sold in Viner's life-time, and there may have been other purchasers through booksellers whose names did not get on the list. In 1757 some 400 copies remained, see the advertisement of Viner's executors printed in App. I (2) ; and in 1758 96 sets and 3008 odd copies remained unsold, Papers relating to Viner's benefaction in the Bodleian, Gough 96 ; it is not unlikely that Viner printed an edition of 1000 copies.

[4] See J. D. Cowley, a Bibliography of Abridgments (S.S.) lxxviii ; Mr. Cowley says that Kelham's name is not connected with this index in any work earlier than Clark's Bibliotheca Legum (1819) ; but the facts stated about Kelham by Mr. Cowley make Clark's statement not improbable.

[5] Ibid nos. 279, 294.

[6] " I am the more frequent in my reference to Mr. Viner's Abridgment, because it tends to facilitate the use of that immense body of law and equity ; which notwithstanding all its defects and inaccuracies, must be allowed to be a necessary part of every lawyer's library. It is indeed a most useful compilation, and would have been infinitely more so, if the author had been less singular and more nice in his arrangement and method and more studious in avoiding repetitions," Notes on Co. Litt., note 49 to Co. Litt. 9 a.

[7] Ibid.

[8] Vol. v 376.

reason that Viner did more to perpetuate his name and to facilitate the study of the law by the manner in which he disposed of his money after his death,[1] than by all his toil and expenditure during his life.

The difference between the Abridgments constructed after the style of Rolle's Abridgment and those constructed after the new model can be stated in this way: these later Abridgments tend to be, and have in the nineteenth century become, not notes of cases and statutes roughly put together under alphabetical heads and somewhat arbitrarily chosen sub-heads, but collections of scientifically constructed treatises on all branches of the law. The order of the treatises is alphabetical, but the treatises themselves are constructed in scientific and logical fashion. The earliest of these encyclopædias was published by that prolific, and rather second-rate, writer W. Sheppard in 1656. It is a poor piece of work, something between a law dictionary and a digest. The author produced a revised and enlarged edition in 1675, but both books were soon forgotten.[2] The transition stage between the new style of Abridgment and the old is marked by Comyns's Digest, and the transition is complete in Bacon's Abridgment. Of these two Abridgments therefore I must say something.

Comyns's Digest was translated from the French and published posthumously in 1762 and 1767 [3]—possibly by John Comyns, the author's nephew, who translated and published his uncle's reports in 1744.[4] In form the Digest is like the older Abridgments. But in substance it is like the newer Abridgments; for the entries under each head are arranged on a scientific and logical plan.

> The general plan of this Digest is, that the author lays down principles or positions of law, and illustrates them by instances, which he supports by authorities; and these are branched out and divided into consequential positions, or points of doctrine illustrated and supported in the same manner. By this means, each head or title exhibits a progressive argument upon the subject, and one paragraph (and in like manner one division or subdivision etc.) follows another in a natural and successive order till the subject is exhausted. It is likewise so disposed, that even the titles only of these divisions and subdivisions, and of their several branches (described and enumerated by letters and figures), being selected from the page or margin, do of themselves disclose, in orderly succession, the several links of the chain of argu-

[1] Above 92-94.

[2] Vol. v 377; in both these books the subject matter is dealt with under each head much more in the manner of a text-book or treatise than of an abridgment.

[3] Comyns died in 1740, Foss, Judges viii 114; probably it was a work on which he had been engaged for the greater part of his life, so that it was probably written before Bacon's Abridgment, the first volume of which was published in 1736, below 169.

[4] Above 130.

ment contained in the body of the work; as may be seen, at one view, by having recourse to the *Index*, which contains a transcript of these divisions etc. so selected and extracted.[1]

Only a short step needed to be taken to convert such a Digest into a series of scientifically constructed treatises on all branches of the law alphabetically arranged.

That step was taken when Mathew Bacon's Abridgment was published between the years 1736 and 1766. Bacon died at some date before 1759. His work on this Abridgment ended with the title "Sheriff" in vol. iv which was published in 1759. The remainder of that volume was written by serjeant Sayer; and the next and last volume was written by Owen Ruffhead.[2] The work was at first published anonymously—it was stated on the title page to be by "a Gentleman of the Middle Temple"; but there is no doubt that Mathew Bacon compiled it.[3] Viner said,[4] and his statement was accepted by Blackstone,[5] that it was compiled mainly from MS. materials left by Gilbert, C.B.; and, as Mr. Cowley has pointed out, some corroboration is lent to this view by the fact that Bacon came from Ireland, where Gilbert had held the post of Chief Baron before he was appointed to the English bench.[6] But the best proof of the truth of this view is a comparison between some of the articles in the Abridgment with Gilbert's published works on Ejectments, Devises, and Rents.[7] On the other hand, the correspondence between Gilbert's treatises on Distresses and on Execution is not obvious, and "there is more material in the Abridgment than in Gilbert's existing published treatises."[8] Probably, as Viner suggested, Bacon, besides using Gilbert's MSS. used also such works as Hale, Hawkins and D'Anvers;[9] or it may be, as

[1] Preface to the first Edition.

[2] J. D. Cowley, A Bibliography of Abridgments (S.S.) lxiii.

[3] Ibid lx.

[4] "Whoever compares some Passages in the New Abridgment of the Law with others in a Book called, the *Historical View of the Court of Exchequer* (which is undoubtedly the Work of the Ld. Ch. B. Gilbert) will see a direct Claim therein made to the said Introductory and New Parts of those Books, and will immediately conclude the Author of them Both, as to those Parts, to be one and the same Person. Under this Observation may be likewise rank'd with equal Justice the Book entitled, the *Treatise of Tenures*, the *Law of Uses*, the *History of the Common Pleas* etc. all and every of which tally so exactly with each other, many Times in Words, always in Stile and Method, but above all in that Particular and most useful new Kind of Learning drawn from the Feudal Law, so Peculiar to his Lordship, that it is impossible to imagine Children, so extremely resembling him and each other could be begotten by a different Parent," Preface to vol. 18.

[5] Comm. ii 323 n. *y*, cited Cowley, op. cit. lx n. 2.

[6] A Bibliography of Abridgments (S.S.) lx-lxi.

[7] Ibid lxi-lxii; and cp. above n. 4.

[8] A Bibliography of Abridgments (S.S.) lxii.

[9] "I take all the Introductory and New Parts thereof . . . to be a Collection only from the MS of the late Ld. Ch. B. Gilbert, from the Lord Ch. J Hale, Mr. Serjeant Hawkins's Pleas of the Crown, and Mr. Danvers's Annotations on several Acts of Parliament," Preface to vol. 18.

Mr. Cowley suggests,[1] that Gilbert's MSS. included a MS. Abridgment by Gilbert himself on which Bacon drew largely for his material. Some support is given to this hypothesis by the preface to Gilbert's treatise on Rents which was published in 1758.[2] Moreover it would explain

> why Bacon appears to have used only some of Gilbert's treatises—verbal correspondence would exist between some of the treatises, and the Chief Baron's MS. Abridgment, but this correspondence would probably not extend to all the treatises ; [3]

it agrees with Viner's view that Bacon used Gilbert's MSS. and not his printed books ; [4] and with the view of Gwillim, the editor of the fifth edition of the Abridgment, that Gilbert had supplied Bacon with the greater part of the material for the work—material which, in Gwillim's opinion, Bacon had not used very intelligently.[5] If this conjecture be true Gilbert, C.B., is the pioneer who converted the old Abridgment into the modern legal encyclopædia, just as in earlier days Rolle, C.J., converted the old Abridgments of the Year Books into the New Abridgments of English Law.[6]

Viner refused to regard Bacon's work as an Abridgment. It was, he said, " an ingenious system or treatise of law," which was only called an Abridgment to make it more saleable.[7] He did not see that Abridgments of the old style were things of the past. It is because they were things of the past, it is because they were definitely inferior to the new style of Abridgments, that Bacon's Abridgment had a much larger popularity and a longer life than Viner's. Between 1736 and 1832 it had run through seven editions, it had expanded from three to eight volumes,[8] and Maine called it " our classical English

[1] A Bibliography of Abridgments (S.S.) lxii-lxiii.

[2] The preface alludes to the correspondence between this work and " the heads of a greater work, which were in his own hand-writing, amongst other curious manuscripts collected by a gentleman of the law, and lately sold " ; the treatise on rents was published in 1758, and Bacon died before 1759, so that the manuscripts may have been those in the possession of Bacon, ibid lxii-lxiii.

[3] Ibid lxiii.

[4] Above 169 n. 9.

[5] " Whether he inserted the whole of any tract, or only a part of it, we have reason to think, he inserted it just as he found it. If the author, in different treatises, in order to make each treatise perfect within itself, introduced the same matter conveyed in the same expression, the compiler implicitly copied it, and under different titles of his work introduced the same passages to the extent of several pages. If the manuscripts were in any part defective, if the subjects were but partially treated of in them, the titles which related to those subjects were left equally defective in the Abridgment. The compiler seemed to have as little inclination to supply the deficiencies of his author as he had sagacity to mark or correct his errors," Preface to the fifth Ed. of Bacon's Ab. ; Gwillim tells us that he had used Gilbert's tracts for his edition, and that he had " given entire " a MS. treatise by Gilbert on the Doctrine of Remainders which had been lent to him by Hargrave.

[6] Vol. v 376.

[7] Preface to vol. 18.

[8] J. D. Cowley, A Bibliography of Abridgments (S.S.) lxiii-lxiv.

Digest." [1] Between 1841 and 1844,[2] and between 1861 and 1864,[3] the two editions of Petersdorff's Abridgment provided an encyclopædia which embodied the extensive legislative changes of the first half of the nineteenth century; and in the preface to the second edition the author stated clearly the characteristic which distinguishes the modern encyclopædia from the earlier Abridgment. The subject matter of the work, he said, "was arranged in alphabetical and analytical order—the former, as regards the primary title or division; the latter, as regards the subordinate disposition of the materials." To it have succeeded our modern encyclopædias—the Encyclopædia of English Law, and Lord Halsbury's Laws of England.

The growth in the size of the Abridgments constructed upon Rolle's model had made the material contained in them not very accessible. To meet this defect both D'Anvers and Viner had found it necessary to construct elaborate indices. Still more were these indices necessary for the Abridgments of the new model—as the editor of Comyns's Digest pointed out.[4] In this way the authors of these Abridgments have combined the requirements of system and logic with the need for accessibility by a double application of the alphabetical principle.

In addition to these general Abridgments of English law, three Abridgments of equity cases were published in the eighteenth century. The most important of these Abridgments, and the only one which was completed, is *Equity Cases Abridged*, which I have already mentioned when dealing with the reports of equity cases.[5] The first part was published in 1732, and the second in 1756.[6] In the second volume the author has made a larger use of MS. reports than in the first volume, and he has relied very largely on Peere Williams's reports, which, as we have seen,[7] were published between the years 1740 and 1749.

[1] Early Law and Custom 371.

[2] A Practical and Elementary Abridgment of the Common Law as altered and established by the recent statutes, Rules of Court, and modern Decisions, from M.T. 1824 to M.T. 1840. The same author had published in 1825-1830 an earlier Abridgment of common law cases from 1660-1824.

[3] A concise Practical Abridgment of the Common and Statute Law as at present administered in the Common Law, Probate, Divorce, and Admiralty Courts . . . comprising a series of condensed Treatises on the different Branches of the Law.

[4] "As the Author pursues each Head or Title through its various branches, it consequently follows, that he must include many Titles which happen to be subordinate to his general head (and therefore, with the strictest propriety, come in as a division or subdivision of it), and yet, at the same time, are worthy of being considered as general heads of themselves, and such as a Reader would, without question, search for as General Heads in the *Index;* in which search he will not be disappointed; for wherever that happens, he will always find a reference to the head or title in which it is contained."

[5] Vol. vi 618, 619; above 144.

[6] J. D. Cowley, A Bibliography of Abridgements (S.S.) lxvi.

[7] Above 142.

Both volumes were said to be written by "a Gentleman of the Middle Temple." [1] Viner thought that the author of Part I was a certain Mr. Pooley,[2] who is said to have been the author of *Precedents in Chancery*.[3] But Mr. Cowley has proved that the "gentleman of the Middle Temple" who wrote this Abridgment is the same gentleman who wrote Bacon's Abridgment—that is Mathew Bacon.[4] The evidence for this fact is partly indirect—cases from *Equity Cases Abridged* are copied literally in Bacon's Abridgment; and partly direct—Sir William Lee stated in his copy of *Equity Cases Abridged* that it was written by Bacon "a gentleman of Ireland and, as I have been informed, a student at the time of its publication"; and Worrall in his *Bibliotheca Legum*, which was published in 1746, makes the same statement as to Bacon's authorship.[5]

The first of the other two unfinished Abridgments of equity cases was *A New Abridgment of Cases in Equity and of such Cases at Law as relate to Equitable Subjects*, published in 1793 [6] by Josiah Brown [7]—the author of Cases in Parliament.[8] The period covered was from 1735 to 1793. The one volume published ran from "Abatement" to "Revivor." The second of these Abridgments was written by R. W. Bridgman, and was entitled *Thesaurus Juridicus*. It contains a digest of equity cases, together with some revenue cases, from the Revolution to 1798. Two volumes were published down to the title "Demise le Roy." [9]

In conclusion I must say a few words as to the merits of this alphabetical manner of arranging the law which, under different forms, has, as we have seen, been a constant feature of English law from a very early period.

Students of jurisprudence and institutional writers, rather than practitioners, have interested themselves in speculations as to the best method of arranging a body of law; [10] and both the theory and practice of a logical method in the treatment of legal topics owe a large debt to them. It is easy to see why this is so. Both jurisprudence and legal education demand a concentration upon the leading principles of the law, and a consideration of their inter-relation. This demand necessarily brings to the front the question of the arrangement and classification of principles and rules, and, though it has often led to speculation

[1] J. D. Cowley, op. cit. lxvi.

[2] See the references to Viner's Ab. cited ibid. lxvii, and especially title *Trial* A.h. 10.

[3] Vol. vi 618.

[4] A Bibliography of Abridgments (S.S.) lxviii.

[5] As Mr. Cowley says, ibid, since the work was, as Lee says, published in the author's student days, it is not surprising that it was published anonymously.

[6] There was a second edition in 1803, ibid lxix n. 1.

[7] Ibid no. 286 and lxix.

[8] Above 104.

[9] A Bibliography of Abridgments (S.S.) lxix and no. 293.

[10] See Maine, Early Law and Custom 362-367.

and controversy of an unprofitable kind, it has helped to improve our legal literature. But the efficacy of scientific schemes of arrangement has its limitations. Whatever *a priori* principles we lay down as to the arrangement of our code, however logically we develop them and apply them to its composition, the code when complete will be useless without an alphabetical index.

After all, the main object of any scheme of legal arrangement is to enable lawyers to find their law. Judged by this test, the alphabetical Abridgment, as used and developed by English lawyers, is incomparably superior to any other method. The Roman lawyers, in their larger professional books, followed simply a traditional order. Professor Girard tells us that the arrangement of Justinian's Code and Digest follows the arrangement of the digesta, or encyclopædias of law, made by the jurisconsults; and that these were composed on a composite plan, consisting of a first part which corresponded to the commentaries on the edict, and a second which corresponded to the treatises on the civil law.[1] Hale truly pointed out that the general heads under which the modern civilians digested their law were "like common Boxes, in which many particulars are placed; but the particulars themselves, their Tractates, Responses, Counsells, and Decisions, have little other method than our Common-Law-Books have, or easily may have."[2] In fact, the traditional order followed by the Roman lawyers is not unlike the method pursued by Coke in his "Institutes." In the first Institute he pursued the traditional mediæval method of grouping large parts of English private law round its oldest branch—the land law,—taking Littleton's summary as his text. In the second Institute he dealt with the enacted law; in the third with the criminal law; and in the fourth with courts and their jurisdiction. But this purely traditional method of grouping the legal topics of any given legal system, though it enables lawyers who have been educated in that system to find their law, is hardly satisfactory when its growth has altered the grouping and the relative importance of its parts. It is still less satisfactory for a body of law, like the English law, which is constantly expanding to meet the new needs of a changing society. If the general heads, or "common boxes" in which the law is arranged, are constantly increasing in number, an alphabetical arrangement is obviously better than a purely arbitrary order.[3]

[1] Girard, Manuel Elémentaire de Droit Romain (2nd ed.) 63. Justinian's and earlier Codes followed this arrangement, ibid 75; and the same thing is true of the arrangement of the Digest, ibid 77; cp. Maine, Early Law and Custom 369-371.

[2] Preface to Rolle's Abridgment.

[3] This was found to be true not only of the law as a whole but also of particular branches of the law which had become very elaborate, such as the law which centred round the justices of the peace, vol. iv 119, and the law of pleading, vol. v 386, and such as the books of Entries which contained precedents of pleading, vol. v 384.

In fact, for such a body of law the alphabet is the only workable expedient. We all recognize that that is the only possible plan upon which a general encyclopædia can be compiled. But a system of law must deal with all sides of the national life; and so, though its contents are very much smaller than the entire body of human knowledge with which a general encyclopædia deals, they are almost as heterogeneous. Necessarily this heterogeneous character is emphasized by the English system of case law, because, as Hale saw, that system keeps the law in constant touch with the multifarious problems of actual daily life, and is therefore "better applicable to the business that comes to be judged by it." [1] For this reason the alphabet is as necessary to the arrangement of a complete statement of English law as it is to a complete statement of all the various branches of human knowledge.

The construction of encyclopædias is an old undertaking; but we are told that it was not till the seventeenth century that the obvious expedient of the alphabetical arrangement was adopted.[2] It is a testimony to the practical sagacity of English lawyers that they were adopting the alphabetical arrangement, and applying it to the common law, more than two centuries earlier. And the way in which they developed it from small collections of cases and statutes to larger and still larger collections, from somewhat heterogeneous collections of all the rules of English Law to the modern encyclopædias logically arranged and elaborately indexed, is a testimony to their power of developing from an obvious expedient a wholly original idea. They have used the alphabet to make English law accessible; and by the help of alphabetical indices, that is in effect by the double application of the alphabetical principle to which I have already alluded, they have grouped English law alphabetically into logically arranged treatises, the subjects of which are selected so that due weight can be given both to the historic order of topics in the English legal system and to new topics as they emerge. Thus a method of arrangement has been devised which is free from three of the great weaknesses of a purely logical system—the neglect of the historic order of development, the inaccessibility of the material without the key to the logical

[1] "The Common Laws of England are more particular than other Laws, and this, though it renders them more numerous, less methodical, and takes up longer time for their study, yet it recompenseth with greater advantages, namely it prevents arbitrariness in the Judge, and makes the Law more certain and better applicable to the business that comes to be judged by it. Generall Laws are indeed very comprehensive, soon learned, and easily digested with method; but when they come to particular application, they are of little service," Preface to Rolle's Abridgment.

[2] Encyclopædia Britannica (11th ed.), tit. "Encyclopædia" ix 372-373. The first alphabetical encyclopædia written in English was by John Harris, and was published in 1704, ibid 373.

labyrinth, and the artificiality which results from the attempt to force multifarious human activities into a purely logical system. I think, therefore, that we should regard the manner in which English lawyers have used and developed the alphabet as a method of legal arrangement as one more example of their practical ingenuity and fertility of invention in matters legal and political, which has given us our modern system of case law and our modern jury system, which made of a mediæval Parliament the principle organ of the government of a modern State, and completed the law of the Constitution by an elaborate superstructure of conventions.[1]

The Law Dictionaries and Indices

I have already said something of the law dictionaries of the sixteenth and seventeenth centuries—the *Termes de la Ley*,[2] and the works of Cowell,[3] Spelman,[4] and Blount.[5] Some of these dictionaries continued to be reissued in new and enlarged editions during the eighteenth century. Thus Blount issued enlarged and corrected editions of the *Termes de la Ley* at the end of the seventeenth century;[6] a further enlarged edition appeared in 1721 which was reprinted in 1742, and again reprinted in America in 1812 and 1819.[7] Cowell's *Interpreter* was reprinted and enlarged by Thomas Manley in 1672 and 1684.[8] A much enlarged and improved edition was issued by White Kennet in 1701, which was reprinted in 1708.[9] The last edition, which was probably edited by William Nelson, appeared in 1727.[10] We have seen that Blount's law dictionary—his *Νομολέξικον*—was first published in 1670.[11] It was reprinted

[1] Mr. J. D. Cowley, in his valuable Bibliography of Abridgments (S.S.) xcv, has said that there are two serious objections to this alphabetical method—(1) that no Abridgment can be self-indexing, and (2) that some titles are so extensive that they cannot be contained in a single volume. I think that the first objection is met by the provision of an index, and that the second is an objection, not to the alphabetical method of arranging a body of law, but to the complexity of the law itself.

[2] Vol. v 401; see also Cowley, A Bibliography of Abridgments (S.S.) lxxxi-lxxxii; Mr. Cowley, op. cit. lxxix-lxxxi, has called attention to three legal glossaries, generally known as Expositiones vocabulorum, "consisting of word lists of difficult terms in the so-called laws of Edward the Confessor, but not arranged in alphabetical order"; one of these lists was included in the 1481 Abridgment of the statutes (vol. iv 311), and was included in John and William Rastell's Abridgments of the statutes; later editions of the Termes de la Ley introduced it into that work, Cowley, op. cit. lxxxi, lxxxiii.

[3] Vol. v 21-22; Cowley, op. cit. lxxxiv-lxxxviii.

[4] Vol. v 402; Cowley, op. cit. lxxxviii.

[5] Vol. vi 612; Cowley, op. cit. lxxxix.

[6] Ibid lxxxiii. [7] Ibid lxxxiv. [8] Ibid lxxxvii. [9] Ibid.

[10] "The presence in it of a rhyming list of sovereigns taken from the 1717 edition of Blount's *Law Dictionary*, edited by William Nelson, suggests that Nelson was also the editor of this last edition," ibid lxxxviii.

[11] Vol. vi 612.

in 1691, and an enlarged edition was brought out by William Nelson in 1717.[1]

Nelson, who speaks disparagingly of the earlier editions of the *Termes de la Ley*, of Cowell's *Interpreter*, and of Blount's first edition, claims to have added nearly 3000 words, which he collected from all the laws of the Saxon, Danish and Norman kings, making free use of Somner's [2] *Lexicon*, 1659, and Benson's *Thesaurus Saxonicus*, 1701.

A new departure in law dictionaries was made by Giles Jacob, who began his law dictionary in 1720 [3] and published it in 1729.[4] It is a fine piece of work, and much superior to his other books—these other books, he himself said, were in the nature of trial trips, and gave him the experience needed to produce his dictionary.[5] Jacob's dictionary is a new departure because it attempted, with a considerable measure of success, to combine in one work a dictionary and an Abridgment. The work, he said,[6]

contains the derivations and definitions of words and terms used in the law, and likewise the whole law, with the practice thereof, collected and abstracted from all other books in an easy concise method . . . so that although I have the interpretation of words, to give it the title of a dictionary, yet my scheme is very different from the other law dictionaries: and the great lawyer Sir Edward Coke having observed that the forms of writs and judicial proceedings do much contribute to the right understanding of our law; therefore these, together with forms of deeds and conveyances, illustrating the practice on that head, are here inserted: Further the reader will find interspersed, taken from the most ancient treatises of the British, Saxon, Danish, and Norman laws such informations as explain the history and antiquity of the law, with our manners, customs, and original form of government.

Above two-thirds of the work was, he said, new; and he claimed that he had not, like the compilers of other law dictionaries, transcribed verbatim from his predecessors. Thus Jacob's dictionary comprised three things in one—a dictionary, an Abridgment, and a vocabulary. The dictionary was very successful. "In the year of the author's death (1744) it reached its fifth edition, and six more editions appeared in London before the close of the century." [7] T. E. Tomlins published the eleventh edition in 1797, and he later published other editions in his own name.[8]

If we except the smaller dictionaries compiled for the use

[1] Cowley, op. cit. lxxxix. [2] Ibid lxxxix-xc.
[3] Preface to the first edition. [4] Cowley, op. cit. xc-xci.
[5] "As for what I have already written, a prudent author will commonly attempt many of the smaller matters, by way of trial of his abilities, and see their success, before he will have courage to venture upon larger; and if I had not experienced what hath fallen in my way, it would have been impossible for me to have perfected the ensuing treatise with that advantage it is now handed to the publick," Preface.
[6] Preface. [7] Cowley, op. cit. xci. [8] Ibid.

of law students,[1] the two other eighteenth-century law dictionaries by Cunningham and Marriott followed Jacob's lead, and attempted to give an account of the whole law. The former of these dictionaries extended to two, and the latter to four volumes.[2] As Mr. Cowley has pointed out, this attempt to include the whole law was producing confusion. "A dictionary from its very nature must be self-indexing"; but "the lengthy titles used by Jacob and Cunningham" needed an index to make the information in them easily available to the reader.[3] The result was that, in the nineteenth century, the attempt to state the whole law in a law dictionary was abandoned. The definitions given in the law dictionaries became more concise, and the distinction between the law dictionary and the Abridgment came again to be well marked.[4]

Some of the earlier law dictionaries, such as the *Termes de la Ley*, contained vocabularies of Anglo-Saxon and Norman French words;[5] and we have seen that Jacob's dictionary contained a vocabulary of these words.[6] Two books which were simply vocabularies were published in the eighteenth century. In 1701 a Law-French and Law-Latin dictionary was published by an anonymous writer. The Law-French part is superficial: the Law-Latin part, which was designed for the use of pleaders, was fuller and more satisfactory.[7] In 1779 Robert Kelham published a Law-French dictionary. It is not a satisfactory work, since "phrases are jumbled up with simple words and no quotations or references are given."[8] The fact that no adequate Law-French dictionary had as yet been published was emphasized by the Selden Society in the original account of its objects which it issued in 1887. One of its objects was stated to be the collection of materials for dictionaries of Anglo-French and of law terms; and instructions for the collection of materials for these dictionaries were drawn up by Professor Skeat. But so far neither of these dictionaries has materialized. But the mediæval Latin Word-List, issued in 1934 under the direction of a committee appointed by the British Academy, will be of considerable value to lawyers and historians of mediæval law.

We have seen that in the late sixteenth and early seventeenth centuries the most indefatigable indexer of reports and statutes was Thomas Ashe.[9] With the exception of two seventeenth-century

[1] A students' law dictionary was published in 1740, Cowley, op. cit. xci and no. 235, and Richard Burn left a law dictionary which was published by his son John Burn in 1792, ibid xci.

[2] Ibid xci-xcii. [3] Ibid xcii. [4] Ibid.

[5] Above 175 and n. 2. [6] Above 176.

[7] Cowley, op. cit. xcii-xciii. [8] Ibid xciii.

[9] Vol. iv 312; vol. v 374-375; Cowley, op. cit. lxxi-lxxv; for earlier indices to the Year Books see vol. v 374 n. 3; Cowley, op. cit. xlvii-xlviii, lxix-lxxi.

indices to Coke's reports,[1] no further index was published till, in 1719, an anonymous author published an index of cases.[2] A second edition appeared in 1736 under the title of "A General Index to the Common Law." [3] In 1742 a barrister of the Middle Temple, supposed to be Kennett Freeman, published a "Repertorium Juridicum." [4] It is described as "an index to all the cases in the Year-Books, Entries, Reports, and Abridgments in law and equity: beginning with Edward I and continued down to this time, containing near forty thousand cases." [5] Both these indices contained a subject index in which the cases were arranged in chronological order under titles, and an alphabetical list of cases.[6] There is no doubt that Freeman's book was very useful—"in at least one law library," says Mr. Cowley, "it is in fairly constant use at the present time." [7] I have already noticed the concordance of the Abridgments, with special reference to Viner's Abridgment, which has been attributed to Robert Kelham.[8] We have seen that one or two indices to the statutes had been published in the eighteenth century; [9] but that a committee of the House of Commons reported in 1796 that no adequate index existed.[10] We have seen also that it was not till 1870 that this need was supplied by the publication of the official Chronological Table and Index of the Statutes.[11]

III

Equity

In the preceding volumes of this History I have given an account of the beginnings of the equity administered by the Lord Chancellor in his court of Chancery.[12] We have seen that, at the end of the seventeenth century, it had entered on its latest phase, and was rapidly becoming a settled body of principles and rules.[13] We have seen also that the procedure through which those principles and rules were administered was beginning to show some of those defects of technicality, delay, and expense which, at the end of the century, made the procedure of the court of Chancery perhaps the greatest blot upon the English

[1] Cowley, op. cit. lxxv. [2] Ibid lxxvi-lxxvii. [3] Ibid lxxvii.
[4] Ibid. [5] Ibid no. 236. [6] Ibid lxxvi, lxxvii.
[7] Ibid lxxviii; for the modern Digests and Indices of case law see Winfield, Chief Sources of English Legal History 197-199.
[8] Above 167. [9] Vol. xi 318 n. 8.
[10] Vol. xi 310. [11] Ibid 319.
[12] Vol. i chap. v; vol. iv 275-283, 417-443; vol. v 215-338; vol. vi 523-551, 613-619, 640-671; for the earliest phase in the history of equity when it was developed, not by the Lord Chancellor in his court of Chancery, but by the common law courts see vol. ii 245-249, 334-347.
[13] Vol. vi 640-671.

legal system.[1] It was in the eighteenth century that the principles and rules of equity attained their final form, and that the system of equitable procedure was elaborated with these unfortunate results. The history of that system of procedure I have traced in the second part of the preceding Book of this History ; [2] and I shall trace the history of the development of some of the leading principles and rules of equity in the second Part of this Book.[3] At this point I shall describe the manner in which the system of Equity was being developed during this century. In the first place, I shall say something of the literature of equity. Secondly, I shall give some account of the Chancellors and Masters of the Rolls, and their contribution to equitable doctrine, down to 1737, when Lord Hardwicke became Chancellor. Thirdly, I shall give some account of Lord Hardwicke and of his great contribution to the formation of the modern system of equity. Lastly I shall give some account of the Chancellors and Masters of the Rolls after Lord Hardwicke.

The Literature of Equity [4]

We have seen that in the preceding period books on equity practice and pleading had begun to appear.[5] This series of books is continued in this period, and the books naturally tend to grow more elaborate with that growth of the elaboration of the rules on these matters, the history of which I have already traced.[6] But since equity was rapidly becoming a system of definite principles and rules we get in this period books upon these principles and rules. I shall say something first of the books upon practice and pleading, and secondly of the books upon the principles of equity.

Books upon practice and pleading.

In the first place, as in the preceding period,[7] a considerable number of these books was published, mainly for the use of practitioners. Secondly, one of these books was intended mainly for students. Thirdly, two of them were superior to the ordinary run of these books, and therefore have a greater importance in the eighteenth-century literature of equity.

(1) At the end of the seventeenth century William Brown, a clerk of the court of Common Pleas, published his *Praxis*

[1] Vol. i 424-428, 437-442. [2] Vol. ix 335-408. [3] Part II chap. i.

[4] Both for the literature of equity and for the literature of the common law Sweet and Maxwell's Bibliography of English Law vol. ii, compiled by Leslie F. Maxwell, will be found a good guide.

[5] Vol. vi 615-616. [6] Vol. ix 335-408. [7] Vol. vi 615-616.

Curiae Cancellariae.[1] The author aimed at producing a summary of the rules of practice and pleading, together with a collection of precedents of pleadings and writs. The first volume gives an outline of the rules of practice, an account of the writs and other process used by the court, a precedent of the pleadings in an appeal to the House of Lords, precedents of various kinds of bills, an account of the orders in Chancery grouped under different headings, and some precedents of affidavits. The second volume begins with an introduction in which an account is given of the court and its officers, of certain cases in which there was no remedy in equity, and of some miscellaneous cases on the practice of the court.[2] The main part of the volume consists of precedents of bills, answers and other pleadings. The book gives a good deal of information in a somewhat disorderly fashion. But it was evidently found useful by students and practitioners, since it passed through four editions in thirty years. William Bohun's book on the *Cursus Cancellariae*[3] is a somewhat shorter, but a more systematic, account of the same subject matter. Not so many precedents are given as in Brown's book, but there is more information about them and the book is better arranged. The book ends with an account of the result of the controversy between Coke and Ellesmere, which was inserted to supply the omission of this information in the account given in the Reports in Chancery.

An anonymous book entitled *The Practical Register in Chancery* was published in 1714.[4] It set out under alphabetical heads the rules and orders of the court, the rules of practice established by the cases, and the statutes which had altered those rules. It also gave some practical information as to the

[1] *Praxis Almae Curiae Cancellariae:* Being a Collection of Precedents by Bill and Answer, Plea and Demurrer, in Causes of the greatest Moment (wherein Equity hath been allowed) which have been Commenced in the High Court of Chancery for more than 30 Years last past. With Appeals (in several Cases of great Difficulty) to the House of Peers in Parliament, and the Proceedings thereupon. Also a Compleat Collection of all the Writs and Process concerning the same. Together with a Praeliminary Discourse, by way of Rules, Succinctly and Methodically drawn up, containing the Practice of the said Court, in every branch of the Equitable Part thereof; see vol. vi 616 and App. IV (1) xlvii; first published in 1694-1695, second edition 1705; fourth edition with great additions and corrections 1725.

[2] The introduction is separately paged.

[3] *Cursus Cancellariae:* or the Course of Proceedings in the High Court of Chancery. Wherein the Authority, Jurisdiction and *Modern Practice* of that Court are methodically and distinctly treated of, from the Bill Filed, and process thereupon, to the Final Sentence and Decree. As also of Reversing Decrees, by Bills of Review, and Appeals to the House of Lords: And the Method of Proceedings in the Petty-Bag-Office, etc. *With Variety of Useful* Precedents *throughout;* the edition published in 1723 is stated to be the second edition; no first edition is mentioned in the British Museum Catalogue.

[4] In the preface "to the Practicers in the High Court of Chancery" the author begins by saying that he had written it at first for his own use—"What was at the first intended only for private use is now made publick for yours."

drafting of bills, answers, and other pleadings. It is a severely practical book, obviously written by a practitioner; and since the information is given clearly and concisely, it must have been of considerable use to practitioners. Lord Hardwicke said of it that, though not a book of authority, "it is better collected than most of the kind." [1]

Joseph Harrison's *Accomplish'd Practiser in the High Court of Chancery*,[2] first published in 1741, was a book of a similar character to Brown's and Bohun's books.[3] After two introductory chapters on the court and its officers, it discusses the various matters relating to the practice of the court in twenty-two chapters. It gives summaries of the decisions on points of practice, and precedents of the pleadings and decrees and other orders of the court. That it was useful to practitioners is shown by the fact that, after going through eight editions, an enlarged and much amended edition appeared in 1808. In 1785 Robert Hinde produced another book of practice which digested the rules of practice under headings arranged, as far as possible, according to the chronological order of the steps taken in a suit in equity.[4]

(2) The book more especially intended for students is Charles Barton's *Historical Treatise of a Suit in Equity*,[5] which was published in 1796. It gives a slight account of the rise of the equitable jurisdiction of the courts of Chancery and Exchequer, and then states the steps which the parties must take to prosecute suits in equity, from the bill to the decree. It ends by explaining the practice on a rehearing, on a bill of review, and on an appeal to the House of Lords. The forms of the various pleadings, of the writs issued in the course of the suit to compel the taking of the necessary steps to keep it in motion, and of the writs issued to enforce the decrees of the court, are set out; and to these forms explanatory notes are attached. There are some sensible criticisms in these notes on the mode of taking evidence

[1] Davis v. Davis (1739) 2 Atk. at p. 22.

[2] The Accomplish'd Practiser in the High Court of Chancery, Shewing the Whole Method of Proceedings, according to the present Practice, from the Bill to the Appeal inclusive: Containing the Original Power and Jurisdiction of the *Chancery*, both as a Court of Law and Equity; the Office of the *Lord Chancellor*, *Master* of the *Rolls*, and the Rest of the *Officers*. Also the best Forms and Precedents of Bills, Answers, Pleas, Demurrers, Writs, Commissions, Interrogations, Affidavits, Petitions, and Orders; together with a list of the Officers and their Fees: Likewise Other Matters useful for Practisers.

[3] Above 179-180.

[4] The Modern Practice of the High Court of Chancery. Methodized and Digested in a Manner Wholly New.

[5] An Historical Treatise of a Suit in Equity, in which is attempted a Scientific Deduction of the Proceedings used on the Equity Sides of the Courts of Chancery and Exchequer, from the Commencement of the Suit to the Decree and Appeal; with occasional remarks on their Import and Efficacy; and an Introductory Discourse on the Rise and Progress of the Equitable Jurisdiction of those Courts.

in Chancery,[1] and of the part of the bill which, as a matter of common form, charged confederacy and conspiracy against the defendant.[2] It is a clear and straightforward piece of work, but very elementary.

(3) The two books which are distinctly superior to the ordinary run of books on this subject come from the beginning and end of the eighteenth century. The first of these books is Chief Baron Gilbert's *History and Practice of the High Court of Chancery:* the second is John Mitford's book on equity pleading.

I have already said something of Chief Baron Gilbert,[3] of his reports,[4] and of the use which Mathew Bacon made of Gilbert's MSS. in the compilation of his Abridgment.[5] The Chief Baron left a number of MSS. dealing with various topics of law and equity, which were published posthumously in the course of the eighteenth century. Of his books dealing with legal topics I shall speak later.[6] In this section I must say something of his books on equitable subjects, and on subjects closely connected with equity. But with respect to all his books we must remember that they never received the last corrections of their author, that they were carelessly edited,[7] and that one at least was printed from an unfinished MS.[8] Moreover, in many cases, it is clear that we have not got the MS. as Gilbert left it. The editors at many points have added cases and copied from existing text-books [9] in order to bring the books up to date.

The book which deals more especially with equity is entitled *The History and Practice of the High Court of Chancery.*[10] It was first printed in Ireland; and the English edition, which claims

[1] For the defects of the manner of taking evidence see vol. ix 353-358.

[2] As to this see ibid 380, 399. [3] Above 140.

[4] Above 141. [5] Above 169-170. [6] Below 352, 355, 366, 368, 369-371.

[7] Gwillim, in the preface to his edition of Bacon's Abridgment, says: "It was the hard fate of the excellent writings of the late Chief Baron Gilbert, to lose their author, before they had received his last corrections and improvements, and in that unfinished state to be thrust into the world, without even the common care of an ordinary editor. These invaluable tracts were for the most part published not only with all their original imperfections, without any attempt to supply their defects, or explain or correct what seemed in them perplexed or erroneous; but with all the improprieties and inaccuracies which the ignorance or neglect of the amanuensis, whom the author's infirmities compelled him to employ, could accumulate upon them."

[8] Below 187.

[9] Thus in Gilbert's Lex Praetoria at p. 330 there is a statement as to the non-liability of an executor to account for profits made out of the estate, which was repudiated in later cases, which statement is similar to a statement made by Ballow in his Treatise of Equity 75; below 229; so also there is some similarity in the manner in which the two books deal with negotiable and non-negotiable choses in action, Ballow 130, Gilbert 288; and in the manner in which they deal with relief against penalties, Ballow 15, Gilbert 255.

[10] The History and Practice of the High Court of Chancery. In which is introduced an Account of the Institution and various Regulations of the said Court; shewing likewise the ancient and present practice thereof in an easy and familiar method.

to be "printed from a correct manuscript copy free from the numerous errors and omissions of the Irish edition," was published in 1758.[1] The book is in two parts. The first and longer part, entitled *Forum Romanum*, deals with the court of Chancery and its practice and pleading:[2] the second part, of which I shall speak later,[3] is entitled *Lex Praetoria*, and deals with some of the substantive principles of equity.[4] That the first is the longer and more elaborate part, is no doubt due to the fact that, at the beginning of the century, the rules of practice and pleading were more definite and more elaborate than the substantive principles of equity. The book begins with three short chapters on the history of the court of Chancery, on a comparison of the procedure of the civil and canon law with that of the Chancery, and on the origins of the Chancery procedure.[5] In the ensuing chapters it discusses the bill; process; answers and exceptions, replications and rejoinders; the examination of witnesses and publication of their evidence; the decree; bills of revivor; bills of review and appeals; injunctions, the election of a litigant to sue at law or in equity, supplicavits,[6] and writs of *ne exeat regno*. The last chapter contains some general observations on certain of the rules of practice, on the question whether a case is one for legal or equitable remedies, on the rectification of defective conveyances as against the parties or their heirs or assigns, and on agreements rendered unenforceable by the statute of Frauds. The book is a clear and straightforward account of the rules of practice and pleading based on the authorities, and more especially on the author's practical knowledge. At different points the author criticizes some of the abuses which he had observed—the divulgence of evidence before publication,[7] the abuse of keeping back exceptions at the hearing before the master and producing them in court, in order to get the report sent back to the master,[8] and, as we have seen, the need for some regulation of solicitors.[9]

John Mitford's book on equity pleading was by far the best book on that subject which had yet appeared. Mitford was born in 1748 and was called to the bar by the Inner Temple in

[1] Quaere the date of the Irish edition; it is not mentioned in the catalogue of the British Museum.

[2] Pp. 1-233. [3] Below 186-187. [4] Pp. 235-347.

[5] For the influence of the canon law on equity procedure see vol. ix 337-338.

[6] This was a writ "granted upon complaint and oath made of the party, where any suitor of the court is abused and stands in danger of his life, or is threatened with death by another suitor. The contemnor is taken into custody, and must give bail to the sheriff; and if he moves to discharge the writ of supplicavit, the court hears both parties on affidavit, and continues or discharges it as the case appears before them," Forum Romanum 202.

[7] At pp. 141-142; for publication see vol. ix 355-356.

[8] At pp. 167-168; see vol. ix 364-365. [9] At p. 217; above 54.

1770. He became solicitor-general in 1793, attorney-general in 1799, and Speaker of the House of Commons and a privy councillor in 1801. In 1802 he became Lord Chancellor of Ireland and Baron Redesdale. He held that post till 1806. On his retirement he became a member of the Board of Trade and Foreign Plantations, and till his death in 1830 he was an active member of the House of Lords.[1] His book on equity pleading was published in 1780, a second edition was published in 1787, and there were three subsequent editions.[2] The book is prefaced by a short introduction, in which the author begins by calling attention to the leading peculiarity of the administration of equity in England—the fact that it is administered " by courts distinct from those to which the ordinary administration of justice is intrusted." [3] He then goes on to survey the field of equitable jurisdiction, and to summarize the salient features of equity pleading. The largest part of the book is contained in the first two chapters. In the first chapter the complex rules as to various kinds of bills, and manner in which they should be drafted, are explained.[4] In the second chapter the different defences to a bill are discussed and the rules relative to such matters as demurrers, pleas, and answers are explained.[5] In dealing with demurrers for want of jurisdiction, the author gives a short and clear survey of the field of equitable jurisdiction, which he summarizes under ten heads.[6] Two short chapters, one on replications, and the other on incidents to pleadings in general, conclude the work.

When Mitford set out to write his book he was undertaking a difficult task. The existing books on pleading were not satis-

[1] D.N.B.

[2] A Treatise on the Pleadings in the Court of Chancery by English Bill; the fifth and last edition was by Josiah W. Smith.

[3] See vol. i 446-449.

[4] See vol. ix 343-347, 368-369, 379-382, 394-402.

[5] Ibid ix 382-386, 390-393, 402-406.

[6] At pp. 103-132; Mitford summarizes the ten heads at pp. 103-104 as follows: " 1. Where the principles of law by which the ordinary courts are guided give a right, but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate to the purpose; 2. where the courts of ordinary jurisdiction are made instruments of injustice; 3. where the principles of law by which the ordinary courts are guided give no right, but upon principles of universal justice the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent. . . . 4. to remove impediments to the fair decision of a question in other courts; 5. to provide for the safety of property in dispute pending a litigation; 6. to restrain the assertion of doubtful rights in a manner productive of irreparable damage; 7. to prevent injury to a third person by the doubtful title of others [bills of interpleader]; 8. to put a bound to vexatious and oppressive litigation, and to prevent multiplicity of suits; 9. to compel a discovery which may assist the decision of other courts; 10. to preserve testimony when in danger of being lost before the matter to which it relates can be made the subject of judicial investigation." Note that Mitford does not adopt the three-fold division into the exclusive concurrent and auxiliary jurisdiction of the court of Chancery; as to this see below 602.

factory, and the reported cases were often equally unsatisfactory.[1] No one had attempted, as he truly said in the Preface to his first edition, to write a methodical treatise on the subject. Mitford's book was concise and clear; and, since it was based on a thorough knowledge of the principles of equity, it gave satisfactory explanations of the reasons which underlay the scattered rules of pleading which had been laid down in the cases. It thus reduced those rules to order and system, in somewhat the same manner as Stephen's classic book reduced to order and system the common law rules of pleading.[2] Like Stephen's book, it was accepted as authoritative. Lord Eldon said of it that it was "a wonderful effort to collect what is to be deduced from authorities speaking so little what is clear"; [3] and Plumer, M.R., said of Mitford and his book that,

> to no authority living or dead, could reference be had with more propriety, for correct information respecting the principles by which courts of equity are governed, than to one whose knowledge and experience enabled him fifty years ago to reduce the whole subject to a system with such universally acknowledged learning, accuracy, and discrimination, as to have been ever since received by the whole profession as an authoritative standard and guide.[4]

We have seen that, by the end of the seventeenth century, the old controversies between the courts of common law and the court of Chancery, which in the sixteenth and seventeenth centuries had been the occasion for a considerable literature,[5] were dead.[6] Therefore neither this eighteenth-century literature on the practice of the court, nor the eighteenth-century literature on the principles of equity, contains many allusions to them. In these books of practice the only direct reference to them is in Bohun's book on the *Cursus Cancellariae*.[7] The only controversy in the eighteenth century which produced some literature was the controversy between Burroughs and Philip Yorke, the future Lord Hardwicke, on the judicial authority of the Master of the Rolls.[8] Of this controversy and of these books I have already given some account.[9]

[1] "These materials," he said in his Preface, "consist principally, either of mere books of practice, or of reports of adjudged cases, generally short, and sometimes incorrect."

[2] Vol. ix 312. [3] Lloyd v. Johns (1804) 9 Ves. at p. 54.

[4] Cholmondeley v. Clinton (1820) 2 Jac. and W. at pp. 151-152.

[5] Vol. v 269-272. [6] Vol. vi 516, 671. [7] Above 180.

[8] The History of the Chancery by Burroughs (1726), replied to by Yorke in his Discourse of the Judicial Authority belonging to the office of the Master of the Rolls (1727); Burroughs rejoined with Legal Judicature in Chancery (1727), to which Yorke replied with a second edition of his Discourse (1728); the question was settled by 3 George II c. 30 in favour of the view maintained by Yorke, that the Master of the Rolls had an independent judicial authority.

[9] Vol. i 420-421.

Books upon the principles of equity.

We have seen that the best of the early eighteenth-century books on the practice and pleading of the court of Chancery was that part of Chief Baron Gilbert's *History and Practice of the High Court of Chancery* which was entitled *Forum Romanum;* and that to that book he added a second part, which he called *Lex Praetoria*,[1] which was intended to give some account of "the rules that govern in a court of equity."[2] It deals with the following subjects:—(1) the specific performance of agreements; (2) portions; (3) frauds; (4) powers; and (5) wills, executors, administrators, devises and legacies.[3] Under the first head, the difference between the common law remedy of damages and the equitable remedy of specific performance is explained;[4] there is some information given as to the effect of the statute of Frauds and the doctrine of part performance,[5] and as to the effect of fraud;[6] and a number of cases upon marriage agreements and settlements are commented on.[7] Under the second head there is a little information about trusts;[8] but this subject is only slightly treated, since the author had dealt, and perhaps intended to deal more fully, with the subject in his book on *Uses and Trusts.*[9] But he necessarily gives some more detailed information as to trusts of terms in marriage settlements,[10] since this was very closely connected with the topic of portions.[11] Under the head of frauds he deals with the position of volunteers, of purchasers for value, and of the differences between the position of the holders of negotiable instruments and of bonds which were not negotiable.[12] He deals also with catching bargains with heirs,[13] settlements which are a fraud on the husband's marital rights,[14] and other cases of fraud or sharp practice, in which the question whether equitable relief was obtainable had been discussed.[15] Under the head of powers he discusses the question when the defective execution of powers will be made good in favour of purchasers or of volunteers,[16] and the question who are purchasers under a marriage settlement.[17] Under the head of wills the chief subjects discussed are: the doctrine of marshalling of assets, the question of the liability of the personalty and the realty to the payment of mortgage debts, the questions which arise when land is charged with the payment of debts or legacies, and the right to follow assets disposed of by an executor or administrator.[18]

[1] Above 182-183.
[2] Op. cit. 235.
[3] Ibid.
[4] At pp. 235-236.
[5] Ibid 237-242.
[6] Ibid 242-243.
[7] Ibid 245-259.
[8] Ibid 259-262.
[9] Below 187.
[10] At pp. 262-279.
[11] Ibid 279-285.
[12] Ibid 285-291, 293-294.
[13] Ibid 291-292.
[14] Ibid 292-293.
[15] Ibid 294-300.
[16] Ibid 301-306.
[17] Ibid 303.
[18] Ibid 306-321.

The question when a legacy is satisfied by a debt is next discussed ;[1] the difference between the liability of specific and pecuniary legacies to abate if the assets are deficient is explained ;[2] and the cases when a legacy carries interest are enumerated.[3] Various cases are discussed on the subjects of the payment of legacies to infants and married women, the payment of the residue, the liability of the husband for a wife's devastavit, legacies to charities, the liability of trustees for the loss of trust funds, *donationes mortis causa*, and paraphernalia.[4] Many of these cases arose out of questions arising on the construction of particular wills ; and they show that equity was acquiring, by means of the decisions in these cases, a body of definite rules as to the administration of assets ; but that the rules are as yet scattered, and that some of them are not as yet very clearly defined.

Gilbert's book on *Uses and Trusts*[5] deals mainly with the mediæval use, and with the effects of the statute of Uses. Trusts are very lightly touched upon in two short sections dealing with uses upon uses and trusts of terms of years.[6] The book deals rather with the law of property than with the principles of equity. As Lord St. Leonards pointed out in his edition,[7] the book was obviously left unfinished by the author—the subject was completely treated of in the first two chapters, and the last two chapters "consist of discussions on different points which . . . were evidently intended to be introduced in their proper places." Similarly, Gilbert's book on *Devises, Revocations, and Last Wills* deals quite as much with rules of law as with rules of equity.[8] It is divided into nine short sections : (1) who may devise land, and to whom it may be devised ; (2) what words pass a fee in a will ; (3) what pass an estate tail or for life ; (4) executory devises, contingent remainders, and cross remainders ; (5) terms of years and uncertain interests ; (6) devises by implication ; (7) what circumstances are necessary by 32 H. 8[9] and 29 Car. 2 ;[10] (8) revocations ; (9) void devises. The common law rules on all these topics are stated and explained ; and it is clear that, down to the beginning of the

[1] At. pp. 321-327. [2] Ibid 328-329.
[3] Ibid 329-331. [4] Ibid 331-347.
[5] First published in 1734 together with a short treatise on dower ; third edition by E. B. Sugden (Lord St. Leonards) 1811 in which the treatise on dower is omitted.
[6] Op. cit. (3rd ed.) 347-360. [7] Preface.
[8] The book was published in 1756, and to it were added a collection of precedents of wills ; in fact both this and other books upon topics connected with the land law deal necessarily both with legal and equitable rules ; of some of these books I shall speak when treating of the literature of the common law, below 374, 381, 382, 396.
[9] Henry VIII's statute of Wills, 32 Henry VIII c. 1, vol. iv 465-467.
[10] The statute of Frauds, 29 Charles II c. 3 §§ 5, 6, 19, 20, 22, 23, vol. vi 385, 394-395.

eighteenth century, the greatest part of the law was contained in these common law rules; but it is clear from some of the cases cited by Gilbert, and from the later cases cited by his editor, that equity was beginning to play a larger part in questions of construction. The process is begun which will add to the common law rules on this topic a large equitable superstructure.

Though Chief Baron Gilbert's books were probably the first text-books written on the principles of equity, since St. Germain wrote his two dialogues between the Doctor and Student at the beginning of the sixteenth century,[1] the first text-book to get into print was Richard Francis's *Maxims of Equity*, which was published in 1728.[2] Francis took as his texts the following fourteen maxims:

I. He that will have equity done to him must do it to the same person. II. He that hath committed iniquity shall not have equity. III. Equality is equity. IV. It is equity, that he should make satisfaction, which received the benefit. V. It is equity, that he should have satisfaction, which sustained the loss. VI. Equity suffers not a right to be without a remedy. VII. Equity relieves against accidents. VIII. Equity prevents mischief. IX. Equity prevents multiplicity of suits. X. Equity regards length of time. XI. Equity will not suffer a double satisfaction to be taken. XII. Equity suffers not advantage to be taken of a penalty or forfeiture, when compensation can be made. XIII. Equity regards not the circumstance, but the substance of the act. XIV. Where equity is equal, the law must prevail.

To each maxim is appended a short summary of the cases which illustrate its application, and from which the maxim was in fact deduced; for, as Dean Pound has pointed out,[3] "his maxims for the most part are independent attempts to state principles derived from study of the cases." In some cases something like the maxim can be found in the cases cited to illustrate it;[4] but in many cases it is the author's own deduction.[5]

The formulation of maxims is not peculiar to equity, nor is it peculiar to English law. The title of the Digest *De diversis regulis juris antiqui*,[6] and the title of the Sext. *De regulis juris*,[7] contain a number of maxims which were freely drawn upon by the lawyers of many nations; and Coke quoted or invented

[1] For St. Germain's book and its importance in the history of equity see vol. v 266-269.

[2] Maxims of Equity collected from and proved by Cases, out of the Books of the best Authority, in the High Court of Chancery. To which is added the Case of the Earl of Coventry concerning the defective Execution of Powers. Lately adjudged in the High Court of Chancery. By Richard Francis of the Middle Temple Esq.

[3] On Certain Maxims of Equity, Cambridge Legal Essays (1926) 261-262.

[4] E.g. the third maxim, ibid 264-265, and the fourteenth, ibid 269.

[5] E.g. the first maxim, ibid 260-263, the second ibid 263, the third, ibid 264-266, the sixth, ibid 266-267, the twelfth, ibid 267-268, and the thirteenth, ibid 268.

[6] Dig. 50. 17.

[7] Sext. 5. 12.

maxims freely in order to illustrate or sum up the legal principles which he was expounding.[1] We have seen that in the sixteenth century Bacon had written a short tract on the "Maxims of the Law" in which he had commented upon and illustrated twenty-five maxims;[2] and that writers of students' books had taken Bacon's tract as a model which would serve as an introduction to their works.[3] But this method of expounding the law was not suitable for a students' book, and was not intended by Bacon to be used for this purpose. We have seen that he intended his book for practitioners.[4] But in the eighteenth century, the author of the *Grounds and Rudiments of Law and Equity*,[5] was still of opinion that a book of legal maxims, accompanied by comments and illustrations, was the best way of introducing young students to the law.[6] His design was to remedy the defects of the existing books of maxims; and he prefaced his book with a short introduction on law in general, on the sources of law, on the nature of equity, and on legal maxims. But his collection of 526 maxims, rules, principles and sometimes of quotations which had very little to do with law,[7] alphabetically arranged, showed that this style of book was quite unsuited to the young student. It is clear, however, that practitioners and more advanced students found it useful since, within two years of its publication, a second edition was called for.[8] This type of legal literature is now represented by Broom's *Legal Maxims*, which was first published in 1845, and reached a ninth edition in 1924. In that collection the maxims are arranged under the heads of the legal topics to which they refer. It is a great improvement on the *Grounds and Rudiments of Law and Equity* not only by reason of its more logical arrangement, but also because only those maxims which state important legal principles are selected.

[1] As Thayer says, A Preliminary Treatise on Evidence 185 n. 4, "Coke seems to have spawned Latin maxims freely."

[2] Vol. v 398—it was to be part of a larger work—De Regulis Juris—in which all the leading principles of the law were to be set out, ibid.

[3] Ibid 398-399.

[4] Ibid 398 n. 7.

[5] The Grounds and Rudiments of Law and Equity alphabetically digested: containing a collection of Rules or Maxims, with the doctrine upon them, illustrated by various cases extracted from the Books and Records, to evince that these *Principles* have been the Foundation upon which the Judges and Sages of the Law have built their *solemn* Resolutions and Determinations. The whole designed to reduce the knowledge of the Laws of England to a more regular Science and to form them into a proper Digest, for the service of the Nobility, Clergy, Gentlemen in the Commission of the Peace, and private Gentlemen, as well as the Professors and Students of the Law.

[6] "A work of this kind has long been wanted as a necessary introduction to the study of law," Preface.

[7] E.g. no. 150—felix qui potuit rerum cognoscere causas; no. 468—tempus est edax rerum.

[8] It was first published in 1749, and there was a second edition in 1751.

But though books of maxims ceased in the eighteenth century to play a very prominent part in the literature of the common law, the maxims of equity were then beginning to emerge, and to attain a position of some importance in the literature of equity for the following reason: When Francis wrote, the "uncertain and precarious" character of the decisions of the courts of equity was an objection commonly urged against the equitable jurisdiction of the Chancellor.[1] In answer to this objection Francis urged the need, on the one hand, for a stable and therefore a rigid law, and, on the other, for equitable modifications of the rigidity of legal rules, in order to remedy the injustice caused by that rigidity in particular cases;[2] and though he admits that equity "will not adhere to its own most established rules if the least injustice arises from thence," he maintains that it is a mistake to suppose "that it is governed by no rules at all."[3] On the contrary "it is certain that many of the rules of equity have yet been preserved inviolable in all cases because they have never been found to be unjust."[4] It was the object of his book to state and illustrate some of the inviolable rules; and his method of stating certain maxims, and illustrating their application by the cases, was a method well suited to the stage of development which equity had then reached. These maxims retained some of their importance after the principles and rules of equity had become a fixed and definite system of principles and rules; and, as the modern text-books of equity show, they still retain it. This is due to the fact, stressed by Maitland, that equity is not a self-contained

[1] "It is a common objection against our courts of Equity, that their power being absolute and extraordinary, their determinations must consequently be uncertain and precarious: that not being bound by any established rules or orders, nor circumscribed within the limits of positive laws, the unhappy suitor must enter into a court of equity with doubts and fears; and if he has succeeded once, 'tis a great chance but he may fail upon a second trial, either the humour of the judge or the judge himself being changed; and that this is true in fact, for that after the most solemn arguing of causes in all their niceties and circumstantials, decrees made thereon have been frequently reversed by the same, and more often by succeeding Chancellors," Preface.

[2] "Since then human providence is too weak to make laws which shall prove just in all cases; and human nature is too corrupt to be left solely to the guidance and directions of conscience; from hence will appear the excellency of our English polity, which has so wisely obviated the inconveniences arising from both these extreams, either of having no positive law at all, or too strictly adhering to it. . . . The narrow-minded person who labours under his great affection for form and order cannot see the beauty of this contrivance, whereby justice is produced from such jarring jurisdictions; and what neither strict form and order, or absolute latitude in judging, can separately produce, is effected by the excellent temperature of both together. This hath been judiciously compared to the mingling of two herbs, which of themselves are poison, but together make a wholesome medicine," ibid.

[3] Ibid.

[4] "A third mortgagee without notice, by buying in the first, . . . will think himself as secure of that estate, as he would of any other purchase from a tenant in tail under a sufficient common recovery. Many other inviolable rules of equity might be instanced to the same purpose," ibid.

system, but a gloss on the law—following it and supplementing it where it is defective.[1] Its contents, therefore, are and must be, somewhat disparate; so that it is still advisable, as the writers of these modern text-books have realized, to state and illustrate the separate principles, contained in these maxims, upon which depend sometimes the meagre, and sometimes the very extensive gloss which equity has added to the rules of law. I have found that a satisfactory course of lectures on the general principles of equity can be grouped round some of the most important of these maxims.

A very much more important book, entitled *A Treatise of Equity*, was published anonymously in 1737. It is very much more important, because it enables us to see the stage in the development of the principles of equity which had been attained between the chancellorship of Lord Nottingham and the accession to office of Lord Hardwicke. At this point I shall give some account of this important book. We shall see in the second Part of this Book that it can be taken as a good starting-point for the history of the development of many of the principles and rules of modern equity.

It is almost certain that the book was written by Henry Ballow (1707-1782) who was called to the bar by Lincoln's Inn in 1728, and held a post in the Exchequer.[2] The reasons for ascribing the authorship of this book to Ballow are as follows: First, Francis Hargrave's copy in the British Museum contains a note by its owner that it was written by a Mr. Bellewe, and that his manuscript law collections were in the possession of Lord Camden, who was his literary executor. Secondly, Fonblanque, in the preface to the second edition of his book on equity, which, as we shall see, took the form of a commentary on Ballow's text,[3] says that one of the manuscripts, which had passed to Lord Camden under Ballow's will, was a revised and corrected manuscript of a large part of this treatise on equity. Thirdly, Malone stated that a Thomas Ballow was the author of the book. Ballow appears to have been an able lawyer with literary tastes. Dr. Johnson told Boswell that he had learned what law he knew "chiefly from Mr. Ballow a very able man";[4]

[1] Maitland, Equity 19; cp. vol. iv 282.

[2] D.N.B.; he is said to have obtained this post through the influence of the Townshends in whose family he had been a tutor; but his family may have had an hereditary connection with the exchequer since in 1703 a Henry Ballow, who may have been his father, was deputy chamberlain in the exchequer; Black Books of Lincoln's Inn iii 288; he was admitted in 1721, Lincoln's Inn Admissions i 388.

[3] Below 192-193.

[4] April 5 1776 (7th ed. 1811) iii 214; Boswell adds: "When I expressed a wish to know more about Mr. Ballow, Johnson said, 'Sir, I have seen him but once these twenty years. The tide of life has driven us different ways,'" ibid 215; Hawkins has some anecdotes of Ballow in his Life of Johnson, one of which is quoted in the D.N.B.

and we shall see that this verdict upon Ballow's learning is borne out by his book.[1] He was a friend of Akenside the poet, Hargrave said that he was a student of classical literature, and the obituary notice of him in the *Gentleman's Magazine* states that he was " a great Greek scholar and famous for his knowledge of the old philosophy." [2]

The *Treatise* consists of six short books. Book I deals with the nature of equity and agreements in general. Half the first chapter of this book deals with the nature of equity; and the other half, and the other five chapters, deal with the rules of equity as to agreements and covenants. Book II deals with uses and trusts. Part I deals in eight chapters with private uses and trusts, giving some information as to the office and duties of the trustee, and the control exercised by equity over the execution of the trust. Part II deals with charitable trusts, and the control exercised by equity over the guardians of infants and lunatics. Book III deals in three chapters with mortgages and pledges. Book IV deals with last wills and testaments. Part I consists of two chapters on legacies; and Part II of three chapters on executors and administrators. Book V consists of a single chapter on damages and interest. Book VI consists of three chapters on evidence—the first deals with witnesses and proofs, the second with averments and parol evidence, and the third with discovery.

It was because the author was well acquainted with all the existing literature of equity, and because he had a firm grasp of the philosophical basis upon which equity rested,[3] and of the principles and rules which were being created by the Chancellors, that he succeeded in giving to these principles and rules a systematic and a literary form. The book is founded upon, and states accurately, the results of the cases. This is proved by the fact that a former owner of the copy in Lincoln's Inn library was able, in 1781, to insert the references to the cases on which Ballow's statements are based. But the author himself cites hardly any authorities, except one or two statutes, and gives no references to the cases. As Fonblanque says,[4] the value of the work was thereby materially lessened—" the learned might, indeed, by the perusal of it, preserve or revive their knowledge; but to the student, from the want of references it was of little use." But it was the only book which dealt systematically with those principles and rules of equity which were being rapidly developed by the eighteenth-century Chancellors; and at the end of the century Fonblanque (1760-1837), an eminent practitioner in the court of Chancery, and

[1] Below 222-223. [2] Cited Boswell, Life of Johnson (7th ed. 1811) iii 214 note.
[3] Below 223-224. [4] Treatise of Equity, Preface to the 2nd ed.

said by Lord Lyndhurst to be "a perfect master of the philosophy of law," [1] set out to produce an edition of Ballow's treatise accompanied by the authorities which Ballow had omitted to cite. But the period between 1737 when Ballow's book appeared and 1793 when the first edition of Fonblanque's book appeared, was a period during which the principles and rules of equity were rapidly developing into a fixed and systematic form. Fonblanque, therefore, soon found that he must do more than merely supply authorities and references. He found himself bound both to add to his author's text and to correct it:

> In some instances, what the Author had stated as a principle, the Editor found, with reference to more modern decisions, scarcely sustainable as a general rule; and in other cases he found, that what the Author had stated as a mere precedent, had, from its frequent adoption, become the doctrine of the Court.[2]

It was unfortunate that Fonblanque did not adopt the plan which first suggested itself to his mind, and recast Ballow's book. Out of respect for Ballow he rejected this plan, retained Ballow's text, and added a commentary which in length and elaboration very considerably exceeded in bulk the text commented on. The form of a book constructed on these lines was, as Fonblanque admitted, inconvenient. But the commentary was learned and accurate; there was no other up-to-date text-book on equity; and so it is not surprising that it reached a fifth edition in 1820.[3]

This account of the literature of equity shows us that, as compared with the literature of the common law,[4] and even as compared with the literature of those parts of English law which fell within the sphere of the civilian's practice,[5] it was meagre. By far the most important part of the literature of equity is contained in the reports; and this shows us that it was the Chancellors and the Masters of the Rolls who were the creators of modern equity, even more exclusively than the judges of the common law courts were the creators of the common law. Of the work of these Chancellors and Masters of the Rolls down to the accession of Lord Hardwicke I must now speak.

The Chancellors and Masters of the Rolls (1700-1737)

The list of Lord Chancellors or Lord Keepers, Masters of the Rolls, and Commissioners who were appointed during a vacancy

[1] D.N.B.
[2] Preface to the 2nd ed.
[3] The dates of the publication of these five editions are 1793, 1799, 1805, 1812, and 1820.
[4] Below 331-431.
[5] Below 606-646.

of the office of Chancellor, will be found at the foot of this page.[1] In this section I shall say something of the careers of the Chancellors and Masters of the Rolls, and of the contributions which they made to equitable doctrines.

I have already given some account of Lord Keeper Wright.[2] We have seen that he was not a strong judge, and that during his tenure of office business got into arrear. On the other hand it is fair to him to remember that many of the principles and rules of equity were still nebulous, and that some of his decisions did contribute to their settlement. Thus in the case of *Hopton v. Dryden* [3] he gave a decision as to the executor's right of retainer which has been followed in modern times.[4] In the case of *Ward v. Lant* [5] he gave effect to the principle that if a contract or a conveyance has been made for an illegal purpose, the person bound can set it aside, if nothing has been done in fulfilment of that purpose—a principle recognized by Lord Hardwicke, who regarded this decision of Wright's as a material authority.[6] In *Lord Cornwallis's Case* [7] he asserted the principle that, if a general power is actually exercised, the property appointed is assets for the payment of the appointor's debts. He was sometimes assisted by the judges ; [8] and it is said that only one of his decisions was reversed by the House of Lords.[9] In fact, he was a sound common lawyer, and did his best to make himself a competent equity lawyer. He was not wholly unsuccessful. But though some of his decisions helped to settle important principles of equity, there is no doubt that he was the weakest of all the Lord Chancellors and Keepers of

[1]

Chancellors or Keepers	*Masters of the Rolls*
Wright 1700-1705.	Trevor 1693-1717.
Cowper 1705-1710.	Jekyll 1717-1738.
Trevor, Tracy, Scrope } Commissioners 1710.	For the Masters of the Rolls during Hardwicke's Chancellorship see below 245-246.
Harcourt 1710-1714.	
Cowper 1714-1718.	
Tracey, Pratt, Montague } Commissioners 1718.	
Macclesfield 1718-1725.	
Jekyll, Gilbert, Raymond } Commissioners 1725.	
King 1725-1733.	
Talbot 1733-1737.	

[2] Vol. vi 538.
[3] (1701) Prec. Ch. 179.
[4] *Re* Compton (1885) 30 C.D. at p. 22.
[5] (1701) Prec. Ch. 182 ; below 549.
[6] Birch v. Blagrave (1755) Ambler at p. 266.
[7] (1704) 2 Free. 279.
[8] See e.g. Needham v. Smith (1704) 2 Vern. 463.
[9] Campbell, Chancellors iv 245 ; Earl of Huntingdon v. Countess of Huntingdon (1702) 2 Vern. 437.

this period, and that his contribution to the foundation of equitable doctrine is far more slight than theirs.

In 1705 Wright was succeeded by William Cowper who, first as Lord Keeper and then as Lord Chancellor, held the Great Seal from that date till 1710, and again from 1714 to 1718.[1]

William Cowper, the son of Sir William Cowper, is said to have been born at Hertford Castle in 1664.[2] On March 8, 1681-1682, he became a member of the Middle Temple. He was called to the bar May 25, 1688. His father had been a Whig politician, and the son followed his father's political creed. When William of Orange landed on November 5, 1688, he set out with a small band of volunteers, and joined the Prince at Wallingford.[3] He soon acquired a good practice on the Home circuit, and also at Westminster, where he practised both in the common law courts and in the court of Chancery. In 1694 he became King's counsel, and was appointed recorder of Colchester. In 1695 he and his father were elected members for Hertford. In Parliament he soon got the reputation of being one of the best speakers in the House. He assisted in the prosecution of the persons implicated in the assassination plot in 1695-1696, and spoke in favour of the attainder of Sir John Fenwick. His skill as an advocate and as an orator was so great that the House of Lords, on the trial of Lord Mohun, asked that he should sum up the evidence instead of Hawles the solicitor-general.[4] By this time he had become one of the leaders of the Whig party; and, when the Cowper family lost its influence at Hertford, owing to the unfounded charge made against his brother Spencer Cowper of having murdered the quakeress Sarah Stout,[5] a seat was found for him at Beeralston. In 1704 he presented to the House of Commons a sound but unsuccessful argument in favour of the decision of the House of Lords in the case of *Ashby v. White;* and his defence of Lord Halifax, who was prosecuted by order of the House of Commons for failure to comply with his statutory duties as auditor of the exchequer, brought upon him the censure of a House in which the Tories were in the majority.

But the tide was turning in favour of the Whigs who supported the war, and their strength in the House of Commons

[1] D.N.B.; Foss, Judges viii 18-28; Campbell, Lives of the Chancellors iv 257-420.

[2] Campbell, op. cit. iv 259, states this as a fact; but in the D.N.B. it is said that the place and date of his birth are unknown.

[3] See Campbell, op. cit. iv 264-265, for an extract from his journal of this campaign which he sent to his wife.

[4] Foss, Judges viii 20.

[5] For an account of this episode see Campbell, op. cit. iv 275-282; see also 13 S.T. 1190; and for the subsequent appeal of murder brought by the relations of Sarah Stout see 12 Mod. 372.

was increased after the general election of 1705. Cowper had become the leader of that party; a change in the Chancellorship was needed; and, since existing law officers were unequal to the post, the duchess of Marlborough and Godolphin persuaded Anne to entrust the Great Seal to Cowper. He was made Lord Keeper, October 11, 1705. On November 9, 1706, he was raised to the peerage, and, after the passing of the Act of Union with Scotland on May 4, 1707, he was made the first Lord Chancellor of Great Britain—an honour he well deserved since, as one of the commissioners for the union with Scotland, he had taken a leading part in negotiating the treaty for the Union. As a leader of the Whig party he showed wise statesmanship when he resisted the attempt of Marlborough to obtain the office of commander-in-chief for life, and when he resisted the proposal to impeach Sacheverell. But his party resolved to take the suicidal step of impeaching Sacheverell, and so Cowper presided at the trial and voted for his condemnation. On the defeat of the Whigs which followed, Cowper resigned with the rest of his colleagues, in spite of Harley's efforts to induce him to remain in office.[1] For the rest of the reign he was in opposition. He took a prominent part in opposing some of the clauses of the treaty of Utrecht, and later the Schism Act.[2] On the death of Anne he regained office. He was one of the Lords Justices nominated by George I under the Regency Act; and, on the arrival of George I, he was again made Lord Chancellor. He materially helped his party by his memorandum to the King entitled "An Impartial History of Parties," which was a clever statement of the Whig case, from which the moral was drawn that the only safe course for the new dynasty to pursue was to make the Whig party predominant, by giving to it its sole confidence.[3]

George I followed Cowper's advice. In fact, in the first years of the reign, he was the King's chief adviser. He supported the impeachments of the late Queen's ministers; and he advised the measures which were taken to suppress speedily the rebellion of 1715.[4] He presided with dignity and impartiality at the trial of the rebel lords, and at Oxford's impeachment. He supported the Riot Act,[5] and the Septennial Act.[6] The former Act gave the government a much-needed power to deal with disorderly assemblies,[7] and the latter added greatly to its stability.[8] In 1718 he supported the Mutiny Act which

[1] Campbell, op. cit. iv 324-328. [2] 12 Anne St. 2 c. 7; vol. x 47, 50.
[3] Printed by Lord Campbell, op. cit. iv 421-429; vol. x 51-52; Lady Cowper translated this document into French, and the translation was submitted by Bernstorff to the King, Campbell, op. cit. iv 348.
[4] See his letter to the King, ibid 355-357. [5] 1 George I St. 2 c. 5.
[6] Ibid c. 38. [7] Vol. viii 328-329; vol. x 63. [8] Vol. x 63-64.

established a standing army of sixteen thousand men[1]—a measure which was necessary as a protection not only against foreign enemies, but also, on account of the defective state of the police, against internal disorder.[2] Cowper resigned in 1718. His resignation was probably due partly to the disputes between the King and his son, in which Cowper was thought to have been too partial to the son—his wife held a post in the Princess of Wales' household and he opposed a bill which would have made the Prince financially dependent on the King;[3] and partly to the intrigues of his colleagues. He lived till 1723, and during that time he showed his statesmanlike qualities by the part which he took in the debates in the House of Lords. It is true he showed less tolerance than some of his fellow Whigs when he opposed the repeal of the Test and Corporation Acts, which imposed disabilities on the Protestant dissenters and Roman Catholics. But he voted for the repeal of the Schism Act;[4] and he opposed Walpole's bill for raising additional revenue by taxing the estates of Roman Catholics and non-jurors.[5] He opposed the peerage bill;[6] and he opposed the bill enabling the South Sea Company to increase its capital, which gave the opportunity for the orgy of speculation and dishonesty usually known as the South Sea Bubble.[7] On the question of the bill of pains and penalties against Atterbury, he took the opposite view to that which he had taken on the bill for Fenwick's attainder, and urged the government either to impeach him or to take ordinary criminal proceedings.[8] He died October 10, 1723.

There can be no doubt as to Cowper's ability as a Whig statesman. He served his party well; and it would have been better if they had allowed themselves to be guided more often by his advice. He was an eloquent and persuasive speaker; and both as a statesman and as a judge he was strictly honourable. At a time when party strife ran high, he gave impartial and conscientious advice as to appointments to the benches of the common law courts[9] and to the benches of the justices of the peace.[10] His enemies tried to fasten upon him the imputation of immorality; but whatever cause he may have given

[1] 5 George I c. 5.
[2] Vol. x 144.
[3] For Cowper's Latin letter of advice to the King on this matter see Campbell, op. cit. iv 387-389.
[4] 5 George I c. 4.
[5] Campbell, op. cit. iv 404-405.
[6] Vol. x 65-66.
[7] Vol. viii 212-213; vol. x 66-67.
[8] For his speech in Fenwick's case see Campbell, op. cit. iv 272-274; for his speech in Atterbury's case see ibid iv 402-404.
[9] The advice which he gave to George I is printed by ibid 349 *note*; the only recommendation which was coloured by political reasons was the recommendation not to reappoint Lord Trevor C.J.
[10] See his letter to the King on this subject defending himself against the charge of using his powers to appoint justices improperly, ibid iv 373-377.

for this imputation in his youth,[1] he gave none after his marriage. He was married twice, and both marriages were happy.

As a judge of the court of Chancery he won universal approval. He abolished the pernicious custom of receiving new year's gifts from the bar and the officials of his court [2]—a course which the chiefs of the common law courts much disliked and refused to follow.[3] He did not, it is true, abandon the almost equally pernicious practice of taking money for the sale of offices in his court.[4] But that was a practice which was pursued both in the Chancery and the common law courts ; [5] and, if the manner in which Macclesfield exploited it had not secured its abolition,[6] it might have lasted in the court of Chancery as long as it lasted in the courts of common law.

Since Cowper had had a practice both in the common law courts and in the court of Chancery, he was well versed in the law and practice of his court ; and he had acquired some definite and historically correct, though somewhat conservative, views as to the relations between law and equity. He was unwilling to allow equity to interfere unduly with the general principles of the common law ; [7] and his decision not to grant an injunction to prevent a plaintiff, who had brought five unsuccessful actions of ejectment from bringing further actions, because at common law a plaintiff could bring as many actions of ejectment as he pleased, was reversed by the House of Lords.[8] He was occasionally also a little too conservative in refusing to admit necessary and logical developments of equitable principle. His decision that property could not be given to the separate use of a married woman, unless it was given to a trustee

[1] Nothing is proved against him ; and the whole story of his youthful immorality may well be merely a reflection of the absurd charges made by Swift and Mrs. Manley, see D.N.B. ; Swift insinuated in the *Examiner* (nos. 17 and 22) that he was guilty of bigamy ; this " was retailed as a matter of common notoriety by Voltaire, with the substantial addition that Cowper was the author of a treatise in favour of polygamy," ibid.

[2] Campbell, op. cit. iv 296-299 ; the second Lady Cowper related in her diary (cited ibid iv 299-300) how " the Earl of Nottingham, when Chancellor, used to receive these gifts standing by a table, and at the same time he took the money to lay it upon the table, he used to cry out, ' Oh Tyrant Cuthtom (for he lisped) My Lord forbid the bringing them.' "

[3] Ibid iv 300 *note ;* D.N.B

[4] It appears from the evidence given on Macclesfield's impeachment that he received £500 for a mastership in Chancery, Foss, Judges, viii 22 ; below 205-206.

[5] Vol. i 259 and App. XXX, 422 n. 5, 425, 439.

[6] Ibid 440 ; below 206.

[7] " The Court of Chancery cannot controul the maxims of the common law because of general inconveniences," Earl of Bath v. Sherwin (1710) 10 Mod. at p. 1 ; below 209, 234.

[8] Vol. vii 17 ; 4 Bro. P.C. 373 ; Cowper said, " it is a known maxim of the common law, that a man may try his title as often as he pleases in an ejectment. Now for this court to determine that one, two, three, or more unsuccessful trials by ejectment shall be peremptory, *quid aliud* than to assume a legislative power, and alter the maxims of the common law ? "

for her, was not followed.[1] Another of his decisions on the question whether a gift to an executor rebuts the presumption that he is entitled to the undisposed of surplus, was reversed by the House of Lords, which put a different construction on the will;[2] but it is arguable that Cowper's construction and therefore his decision were the sounder. In one of his decisions, which was reversed by his successor, he neglected to observe the distinction, which in another case he had stated quite clearly,[3] between the construction of an executory trust created by marriage articles, where the intent of the parties is obvious, and an executory trust created by will, where it is not obvious.[4] But in very many cases he showed much ability in his analysis of complicated facts, in his statement of the legal difficulties to which these facts gave rise, and in his application of the correct principles to the solution of those difficulties. His decisions in these cases are a very considerable contribution to the formation of the doctrines of equity. Let us look at one or two instances.

The case of *Humberston v. Humberston* introduced a rule which is sometimes known as the "cyprès" doctrine.[5] It was a case of a devise to trustees on trust to convey land to the male issue of Mathew Humberston for an indefinite succession of life estates. It is obvious that this trust offended against the rule that all attempts to create a perpetual freehold were invalid because they created a perpetuity.[6] But it was an executory trust; and therefore Cowper did what he could to carry out the testator's intention by giving life estates to the sons in being, and estates tail to their unborn sons.[7] This doctrine was later adopted by the courts of law and extended to direct devises of land; but only under the strict conditions laid down in the case of *Monypenny v. Dering*[8]—conditions which do not apply where

[1] Harvey v. Harvey (1710) 1 P. Wms. 125; below 231, 275.

[2] Lady Granville v. Duchess of Beaufort (1709) 1 P. Wms. 114; 3 Bro. P.C. 37—as the note to Peere Williams' report says, "the case made to the House of Lords by the appellant considers the devise of the use of the plate to the executrix for life as an *exception* out of the general gift of it to the son, and therefore not such a legacy as should exclude her from the residue"; but it appears also that some of the Lords thought that this exclusion could operate if the executor were guilty of fraud—a view which the later cases have negatived, below 209, 212, 279.

[3] Sweetapple v. Bindon (1705) 2 Vern. 536.

[4] Baile v. Coleman (1711) 2 Vern. 670, 1 P. Wms. 142.

[5] (1716) 1 P. Wms. 332; vol. vii 211; Williams, Real Property (22nd ed.) 421-422.

[6] Vol. vii 209-210.

[7] "Tho' an attempt to make a perpetuity for several lives be vain, yet so far as is consistent with the rules of law, it ought to be complied with; and therefore let all the sons of these several Humberstons that are already born, take estates for their lives; but where the limitation is to the first son unborn, then the limitation to such unborn son shall be in tail male," 1 P. Wms. at p. 333.

[8] (1847) 16 M. & W. 418; (1852) 2 D.G.M. & G. 145.

the doctrine is applied, not to a direct devise, but to an executory trust.[1] In the case of *Watts v. Ball* Cowper laid down the principle that, as equitable estates ought to be governed by the same rules as legal estates, the husband was entitled to curtesy out of an equitable estate.[2] We have seen that this reasoning was not applied to give the wife dower ;[3] but in the case of *Burridge v. Bradyl* Cowper held that a legacy given to a wife in consideration of a release by her of her claim to dower, was payable before other legacies.[4] Other decisions helped to establish the rule that, if a father purchases land in his son's name, there is a presumption against a resulting trust for the father, and in favour of an advancement for the son ;[5] the rule as to the power of the court to set aside catching bargains with remainder men ;[6] the rule as to reconversion, if persons entitled under a trust for conversion become absolutely entitled ;[7] the rule that a portion debt to a wife is satisfied by the receipt by her of a share of her husband's estate, on his death intestate, which is of equal or greater value.[8] In the case of *Bucknal v. Roiston*[9] Cowper recognized the proprietary character of the right of the c.q. trust, and therefore gave him a right to follow the trust property, and assert his claim to it in preference to the claims of the trustees' other creditors. In the case of *Squib v. Wyn* he recognized the husband's right to take on his wife's death her choses in action ;[10] and in the case of *Onions v. Tyrer* he established a doctrine concerning the revocation of wills, which is sometimes known as the doctrine of dependent relative revocation.[11]

These few instances show that Cowper made considerable contributions to the formation of our modern system of equity, and that his reputation as a very able Chancellor and a learned lawyer is justified. That reputation is vouched for not only by opinions expressed by many different writers,[12] but also by

[1] See *re* Richardson [1904] 1 Ch. at p. 344, *per* Buckley J. ; *re* Mortimer [1905] 2 Ch. at p. 512, *per* Vaughan Williams L.J.

[2] (1708) 1 P. Wms. 108. [3] Vol. iii 196-197.

[4] (1710) 1 P. Wms. 127.

[5] Lamplugh v. Lamplugh (1709) 1 P. Wms. 111.

[6] Twisleton v. Griffith (1716) 1 P. Wms. 310 ; below 235, 274-275.

[7] Seeley v. Jago (1717) 1 P. Wms. 389—" equity," he said, " like nature will do nothing in vain."

[8] Blandy v. Widmore (1716) 1 P. Wms. 324 ; below 269.

[9] (1709) Prec. Ch. 285 ; below 273.

[10] (1717) 1 P. Wms. 378.

[11] (1716) 1 P. Wms. 343 ; the principle, as stated by Hannen J. in the case of Dancer v. Crabb (1873) 3 P. & D. at pp. 104-105 is this : " if the testator's act can be interpreted thus : ' Whatever else I may do, I intend to cancel this as my will from this time forth,' the will is revoked ; but if his meaning is, ' As I have made a fresh will my old one may now be destroyed,' the old will is not revoked if the new one be not in fact made."

[12] See Campbell, op. cit. iv 415-419 for some of these appreciations.

Harley's anxiety to retain him as Chancellor after the defeat of the Whigs,[1] and by his successor's testimony to his abilities.[2]

Cowper's successor in 1710 was Sir Simon Harcourt.[3] Harcourt's family had come to England with William the Conqueror, and, from the twelfth century, had resided at Stanton Harcourt in Oxfordshire. Simon, the son of Sir Philip Harcourt, was born in 1660 or 1661. He was educated at a private school at Shilton near Burford kept by a Mr. Birch, and Robert Harley, the future Lord Treasurer and earl of Oxford, and Trevor, the future Chief Justice of the Common Pleas, were his school fellows.[4] From there he went to Pembroke College, Oxford, and took his B.A. degree in 1678. He was called to the bar by the Inner Temple, November 25, 1683. He succeeded to the family estates (which were in an embarrassed condition) in 1688; and in 1690 he was elected a member of Parliament in the Tory interest for the borough of Abingdon, of which town he had been the recorder since 1683. He soon made his influence felt in the House of Commons. He made a powerful speech in opposition to the bill attainting Fenwick, and he was the principal manager of the impeachment of Somers. His services to his party were rewarded by his appointment to the office of solicitor-general in 1702. He supported the occasional conformity bill in 1703, and took the side of the House of Commons in the disputes which arose out of the case of *Ashby v. White*. He was one of the commissioners for the union with Scotland; and we have seen that it was his skill in drafting the Act which ensured its easy passage through Parliament.[5] Harcourt became attorney-general in 1707; but, on Harley's dismissal in 1708, he resigned his office. In the new Parliament of 1708 he was again returned for Abingdon, but was unseated on petition. He was shortly afterwards returned for Cardigan; but, during the short time that he was without a seat, he was able to appear for Sacheverell, and to make on his behalf one of the best speeches he ever made in the whole course of his career.

On the defeat of the Whigs, and on the failure of Harley's attempt to induce Cowper to remain in office,[6] or to induce Parker, the Chief Justice of the King's Bench, to accept the Great Seal,[7] he was made Lord Keeper, October 19, 1710. As Lord Keeper he took a prominent part in the negotiations for the treaty of Utrecht. In 1711 he was raised to the peerage,

[1] Above 196.

[2] In the case of Bale v. Coleman (1711) 2 Eq. Cas. Ab. at p. 311 Harcourt L.K., though he reversed his decision, testified his "great respect for his predecessor."

[3] D.N.B.; Foss, Judges viii 33-41; Campbell, Lives of the Chancellors iv 430-500.

[4] D.N.B. [5] Vol. x 41. [6] Above 196. [7] Below 204.

and on April 7, 1713, he was made Lord Chancellor. On the death of Queen Anne he was reappointed Lord Chancellor by the Lords Justices; but on September 21, 1714, he was dismissed by the King. At the beginning of the new reign Harcourt played the part of a consistent but prudent Tory. In conjunction with Walpole, he helped to defeat the impeachment of Oxford, and helped to get a qualified pardon for Bolingbroke. At the end of his life he very wisely made his peace with the government.[1] He was created a viscount in 1721, in 1722 he was readmitted to the Privy Council, and he acted as one of the Lords Justices during the King's absences from England in 1723, 1725, and 1727. He died in 1727.

Harcourt was an able statesman and a competent lawyer, but he cannot be called either a great statesman or a great lawyer. As a statesman he was an able champion of a losing cause; but he was sufficiently prudent to avoid impeachment when his opponents came into power; and, at the end of his career, he was sufficiently wise to see that the cause which he had championed in his youth was hopeless. As a lawyer he was competent, and as an orator and an advocate he was sometimes brilliant. When, as in his defence of Sacheverell, he got a chance to state and justify his political creed, he won praise from audiences who had listened to Bolingbroke. His speech on this occasion, wrote a contemporary, "was universally applauded by enemies as well as friends, and his reputation as a speaker is fixed for ever." [2] He was the friend and patron of many of the best-known literary men of the day. Pope finished the fifth volume of his translation of Homer in Harcourt's home at Stanton-Harcourt, and he wrote a dedicatory poem for an edition of Pope's works.[3]

As Lord Chancellor he left no deep mark on the history of equity. His best-known decision, which was affirmed by the House of Lords, was his decision in the case of *Pye v. Gorge*,[4] that trustees to preserve contingent remainders, who join in their destruction, are guilty of a breach of trust—a rule, he said, "so very plain and reasonable that if there was no precedent in this case, he would make one." The case of *Brown*

[1] As Campbell, op. cit. iv 489, points out, Harcourt's conduct throughout was honourable; on the one hand, "he never betrayed any confidence that had been reposed in him, and he was always pleased to do a good turn for an old Jacobite friend"; on the other hand, "notwithstanding strong solicitations and temptations, he ever after remained true to the new engagements into which he had entered"—thus he refused to have anything to do with Atterbury's plot "though united to the bishop by the closest ties of private friendship."

[2] D.N.B., citing Smalridge's account of the trial; Speaker Onslow in his note to Burnet, History of My Own Time v 441 (cited D.N.B.), said that Harcourt "had the greatest skill and power of speech of any man I ever knew in a public assembly."

[3] Printed by Campbell, op. cit. iv 485.

[4] (1710) 1 P. Wms. 128; 7 Bro. P.C. 221; below 212.

v. Litton [1] helped to elucidate the law as to constructive trusts; and we have seen that, in the case of *Bale v. Coleman*, he corrected a misapplication made by his predecessor of the rules of interpretation to be applied to an executory trust.[2] Other decisions contain useful applications of the doctrines of satisfaction,[3] conversion,[4] and the marshalling of assets.[5] In the case of *Car v. Countess of Burlington* [6] he laid down the principle that specialty and simple contract debts are payable *pari passu* out of equitable assets. In the case of *Broderick v. Broderick* [7] he gave relief against a devisee under a will defectively executed, who, by representing it to have been properly executed, had got a release from the heir for a small payment; and in the case of *Jenner v. Harper* [8] he held that a devise to a charity by a nuncupative will was, since the passing of the Statute of Frauds, not valid as an appointment under the Act of Elizabeth, which had made these appointments to charities valid.[9] One of his decisions is an important authority as to the liability of co-executors and co-trustees, who had joined in a receipt for money, when the money had been in fact received by one of them and not by the other.[10] In the case of *Tucker v. Wilson* [11] the House of Lords reversed one of his decisions, and established the important principle that a mortgagee of stock has an implied power of sale, and need not take proceedings for foreclosure.[12] Lastly, in *Dones' Case* [13] he laid down the rule that, since Scotland was out of the jurisdiction of the court, a writ of *ne exeat regno* lies, notwithstanding the Act of Union, to prevent a defendant going thither. These decisions make a contribution, but no great contribution, to equitable doctrine. Lord Brougham came to a just conclusion as to Harcourt's position in the history of equity when he said: [14] "Lord Keeper Harcourt, though a respectable lawyer, is certainly not to be ranked with the Parkers, the Finches, and the Hardwickes."

Of Finch, Lord Nottingham, "the father of modern equity," I have already spoken,[15] and of Hardwicke I shall speak later in this chapter.[16] At this point I must say something of Parker, Lord Macclesfield, who succeeded Cowper in 1718.

[1] (1711) 1 P. Wms. 140; below 272.
[2] (1711) 1 P. Wms. 142; above 201 n. 2.
[3] Copley v. Copley (1711) 1 P. Wms. 147; below 269.
[4] Lingen v. Sowray (1711) 1 P. Wms. 172; below 270, 324.
[5] Herne v. Meyrick (1712) 1 P. Wms. 201; below 280.
[6] (1713) 1 P. Wms. 228. [7] Ibid 239. [8] (1714) 1 P. Wms. 247.
[9] 43 Elizabeth c. 4; vol. vii 398-399; 1 P. Wms. at p. 249; below 271.
[10] Churchill v. Hobson (1713) 1 P. Wms. 241; below 273.
[11] (1714) 1 P. Wms. 261; 5 Bro. P.C. 193.
[12] See Dverges v. Sandeman Clark and Co. [1902]1 Ch. at p. 589, *per* Vaughan-Williams L.J.
[13] (1714) 1 P. Wms. 263; cp. Hunter v. Maccray (1736) Cas. t. Talbot 196.
[14] Jones v. Scott (1830) 1 Russ. and M. at p. 269.
[15] Vol. vi 539-548. [16] Below 237 seqq.

Thomas Parker,[1] Lord Macclesfield, was the son of an attorney at Leek in Staffordshire. He was born July 23, 1666, became a student of the Inner Temple, February 14, 1684, and was called to the bar May 24, 1691.[2] He was a pensioner of Trinity College, Cambridge, but left the university without taking a degree. His first important case was *R. v. Tutchin*,[3] in which he appeared for the defendant, who was prosecuted for libel. Tutchin was found guilty. But judgment was arrested on account of an irregularity in the process for summoning the jury; and to this result Parker contributed by an able argument.[4] In 1705 he was elected a member of Parliament for Derby in the Whig interest, became one of the Queen's serjeants, and was knighted. He distinguished himself as one of the managers of Sacheverell's impeachment in 1710, and immediately afterwards, March 13, 1710, he was appointed to succeed Holt as Chief Justice of the King's Bench. He very wisely refused the Great Seal in 1711. On the death of the Queen he acted as one of the Lords Justices till the arrival of George I. He soon became a favourite of the King, who raised him to the peerage in 1716, and granted him a pension of £1,200 a year. He took the title of baron Parker of Macclesfield, and in 1721 he was raised to the dignity of an earl. He consolidated his position at court, and earned the enmity of the Prince of Wales, by the opinion which he and the majority of the judges gave in 1718 that the King could control the education and marriages of his grandchildren.[5] On May 12, 1718, he was created Lord Chancellor, and the King, on that occasion, gave him a present of £14,000 and a pension of £1,200 a year to his son till he became a teller in the Exchequer. He held the office of Lord Chancellor till his resignation in 1725, and, as we shall see, his judgments make a considerable contribution to the formation of our modern system of equity.

Parker resigned on account of the scandals arising out of the use made by the Masters in Chancery of the suitors' money, and out of the sale of the office of Master.[6] In November, 1724, a committee of the Privy Council had been appointed to enquire into the manner in which the Masters had dealt with this money. It was in the hands of the Masters who, during the time that it was in court, enjoyed the interest upon it—a practice which

[1] D.N.B.; Foss, Judges viii 44-52; Campbell, Lives of the Chancellors iv. 501-566.

[2] Campbell, ibid 502-504, emphasizes unduly the humility of his birth, and supposes, without warrant, that he was articled to his father and practised for some years as an attorney at Derby, see Foss, op. cit. viii 45-46, and D.N.B.

[3] (1704) 14 S.T. 1095. [4] Ibid at pp. 1173-1176.

[5] 15 S.T. 1195 seqq.; Parker's opinion is printed at pp. 1222-1223; see vol. x 446.

[6] See vol. i 439-440.

then and later prevailed in other government departments.[1] But it appeared from the report of the committeee that the Masters were not content with this interest. They had speculated with the money, with the result that it had been lost; and it further appeared that there was reason to think that the Lord Chancellor was cognizant of, if not actually implicated in, some of these transactions. At the same time a petition had been presented to the House of Commons by the earl of Oxford and Lord Morpeth, complaining that money in court belonging to the estate of the dowager duchess of Montrose, a lunatic in their charge, had not been accounted for. Early in the following year the results of the investigations of the committee of the Privy Council were laid before the House of Commons, which resolved to impeach the Lord Chancellor.[2]

He was charged with taking sums of money for permission to sell the office of Master;[3] with selling vacant Masterships and other offices in his court;[4] with screening the offences of Masters who were in default;[5] with admitting unfit persons to the office of Master;[6] with conniving at the practice that the incoming Master, who had purchased the office, paid the price out of the suitors' money in the hands of the Master from whom he had bought it;[7] with concealing the delinquencies of Dormer, a Master who had absconded leaving a sum of about £25,000 owing to the suitors;[8] with omitting to take any precautions against the fraud or insolvency of the Masters;[9] with borrowing from the Masters some of the suitors' money;[10] and with illegally appointing as guardian of an infant's estate "a creature of his own," who embezzled a large part of the rents and profits thereof.[11] Parker made a very able defence.[12] It was quite clear that he had only followed the example of his predecessors in selling the office of Master; and, as we have seen, saleable offices in the courts of law existed down to the beginning of the

[1] Vol. x 507.

[2] The proceedings on the impeachment are printed in 16 S.T. 767-1402; the twenty-one articles of the impeachment are printed ibid at pp. 767-784.

[3] Arts. 1, 3, 4, 5, 6, 9. [4] Arts. 2, 7, 8, 10.

[5] Arts. 18, 19. [6] Art. 11.

[7] "That the prices or sums of money agreed to be paid for the purchase of the said offices, and for the admissions thereinto, were satisfied and paid out of the monies and effects of the suitors of the Court deposited in the hands of the respective Masters, surrendering their offices or dying, either by way of retainer of the purchase money in the hands of the Master resigning, or of replacing the money disbursed for such purchase or admission by the succeeding Master, out of the money and effects of the suitors coming into his hands; by which practice the price and value given upon the sale of the said offices . . . were greatly advanced," Art. 12.

[8] Arts. 13, 14, 15, 16, 17. [9] Art. 18. [10] Art. 20.

[11] Art. 21; no evidence was offered in support of Arts. 20 and 21, 16 S.T. at p. 1328.

[12] Ibid 1265-1330.

nineteenth century.[1] Foss has pointed out that the fact that a clause in a bill, which, at the time of the Revolution, proposed to prohibit the sale of a Master's office, was negatived by the Lords, shows that the practice was "in some sort recognized by the Legislature"; [2] and he points out that the fact that

> the price paid by the Masters for their places was considered a legitimate part of the profits of the Chancellor, received a curious confirmation in the grant to Lord Macclesfield's immediate successor, Lord King, of a considerable addition to his salary, as a compensation for the loss occasioned by the annihilation of the practice consequent upon this investigation.[3]

On the other hand, it is clear that Parker had considerably raised the price of vacant Masterships, and the fee payable on the purchase and sale of a Master's place. It was impossible to suppose that he was ignorant of the reason why candidates for vacant Masterships were willing to give higher prices, and why he was able to exact higher commissions on the purchase and sale of a Master's place. It was impossible to deny that he had tried to screen Dormer, the absconding Master, and to prevent any inquiry into the existing system of dealing with the suitors' money. Therefore I think that there is no doubt that he was justly condemned. There is still less doubt that his impeachment and condemnation had the most salutary effects. We have seen that it stopped the sale of Masterships, and that the Legislature took steps adequately to safeguard the suitors' money.[4]

Parker was condemned to pay a fine of £30,000, which was applied to meet the liabilities of the Masters, and to be imprisoned till it was paid. George I stood his friend to the last—promising to pay his fine out of the privy purse. He gave him £1,000; but died before any further sum was paid; and Parker could expect nothing from George II whose enmity he had earned by his opinion in favour of George I's right to control the education and marriages of his grandchildren. The fine was paid within six weeks, and for the remainder of his life Parker lived in retirement. He died in 1732.

Parker had many amiable traits in his character. He was a friend of poor scholars and gave largely in charity; [5] and he was the patron of learned men.[6] He was conscious of the fact that many branches of the law stood in need of reform; and at

[1] Vol. i 259 and App. XXX. [2] Judges viii 51.
[3] Ibid 52. [4] Vol. i 440. [5] See 16 S.T. at p. 1118.
[6] See D.N.B. xliii 281-282, citing the evidence of Warburton, Young, and Zachary Pearce; he helped William Jones, the father of the famous orientalist and scholar, vol. xi 220-221, and Phelps the astronomer; this refutes Campbell's statement, op. cit. iv 561, that he was indifferent to literature and literary men.

some period between 1721 and 1724 he addressed a letter to the Chief Justice of the King's Bench, urging him to consult with his brethren, and to make suggestions for the amending of old and the enactment of new laws.[1] Unfortunately, he not only allowed his moral sense to be blinded by the vicious system of trafficking in offices which prevailed in the courts and in the government offices, but he exploited that system to the utmost —employing his secretary as agent to get the utmost price,[2] and not considering the dangers which were involved in that exploitation at a time when the mania for speculation had seized all classes. And, when the crash came, he not only made no proposals for the reform of this system, but tried to bolster it up, and to prevent a thorough enquiry. But, whatever judgment we pass on him as a man, there is no doubt that he was a great Chief Justice and a great Chancellor. It is said, indeed, that his fall was not regretted by many members of the bar to whom he had not been over-courteous,[3] and that he showed undue favour to Philip Yorke, the future Lord Hardwicke.[4] But these are very minor failings. As we shall now see, the reports of his decisions show that he was both a great common lawyer and a great equity lawyer.

Two of the most famous cases in which he was concerned as Chief Justice of the King's Bench, were the trial of Dammaree and Purchase,[5] who had raised a riot to destroy all meeting-houses, for the treason of levying war against the King; and the case of *Mitchel v. Reynolds* [6] which is the foundation of the modern law as to contracts in restraint of trade. We have seen that the law laid down in the case of *Dammaree and Purchase*, though a severe application of the constructive extension of the clause of the Act of Edward III as to the levying of war against the King, was a correct, and indeed an inevitable, application of the law laid down by authorities which were binding upon the court; and that Foster, who had attended the trial as a student, had no doubt of the correctness of the decision.[7] Parker's judgment is a very clear statement of the law which

[1] Calendar of Treasury Papers, 1720-1728, 297; he said that, in his opinion, the law of executors was the branch of law which stood in most urgent need of reform; it may be noted that many years later Blackstone was prepared to propose reforms in this branch of the law, L.Q.R. lii 53; below 729.

[2] Vol. i 439.

[3] Campbell, op. cit. iv 511-512; D.N.B.; this seems to be borne out by Lord Hardwicke who said, "I knew a judge of great parts and abilities, and of real good nature and humanity at bottom, lose the affections of the Bar, when his fall from his exalted station made him feel the want of them; chiefly by having sometimes given way to a sharpness of expression upon observing their failures, without allowing himself time to check the first emotion," P. C. Yorke, Life of Lord Hardwicke i 105-106; and cp. Speaker Onslow's testimony cited ibid i 87 n. 3.

[4] Below 239 n. 12.

[5] (1710) 15 S.T. 522; vol. viii 320.

[6] (1711) 1 P. Wms. 181; vol. viii 60-62.

[7] Vol. viii 320.

he was bound to apply ; [1] but having applied it, he was instrumental in getting the Queen to pardon both the prisoners.[2] We have seen that the case of *Mitchel v. Reynolds* is an extraordinarily able account of the history of the law as to contracts in restraint of trade, and that it made so skilful an adaptation of the principles of the old law to the new conditions of trade, that the basic principles there laid down are at the root of those modern decisions of the House of Lords in which the modern law is restated.[3] In the case of the *Company of Stationers v. Partridge* [4] he showed that he was hostile to grants by the Crown of printing monopolies, unless the Crown could show that it had some title to the works in which it granted this monopoly. In this case he intimated his opinion that, unless the Crown could show such a title, it could not make a valid grant of the sole right to print almanacks.[5] The case of *Nickson v. Brohan* [6] is a useful illustration of the new doctrine of employer's liability which had been introduced by his predecessor.[7]

It is upon Parker's decisions as Chancellor that his fame is mainly based. He had an accurate acquaintance with the decisions of his predecessors ; and his clear and logical statement of the principles which could be deduced from them, gave old principles a new precision, and indicated the correct lines upon which they should be developed. Let us look at one or two illustrations.

In the case of *Cud v. Rutter* [8] which was a case of a contract to convey South Sea stock, he laid down the principle that the court ought not to grant the remedy of specific performance in these or the like cases, in which damages are an adequate remedy.[9] In the case of *Montacute v. Maxwell* [10] he laid down the principle that a statute must not be used as an instrument of fraud ; [11] and, in another case, at the suit of the husband, he relieved against a bond given by the husband to the wife's father, in fraud of the agreement made between the parents of the husband and wife as to the sums to be settled by each on their children.[12] He gave this relief to a guilty party because, to refuse relief on the principle *in pari delicto potior est conditio*

[1] 15 S.T. at pp. 699-702.
[2] Campbell, op. cit. iv 513 ; Foss, Judges viii 47.
[3] Vol. viii 60-62.
[4] (1712) 10 Mod. 105.
[5] 10 Mod. at p. 107 ; cp. Lord Mansfield's account of this case in the case of Millar v. Taylor (1769) 4 Burr. at pp. 2402-2403 ; vol. vi 373.
[6] (1712) 10 Mod. 109.
[7] Vol. viii 474-475.
[8] (1719) 1 P. Wms. 570.
[9] "A court of equity ought not to execute any of these contracts, but leave them to law, where the party is to recover damages, and with the money may if he pleases buy the quantity of stock agreed to be transferred to him ; for there can be no differences between one man's stock and another's," ibid at p. 571 ; below 276-277.
[10] (1720) 1 P. Wms. 618.
[11] At p. 620 ; below 234-235, 272.
[12] Turton v. Benson (1718) 1 P. Wms. 496.

defendentis, would facilitate such frauds.[1] He laid down the principle that for many purposes a child *en ventre sa mere* must be regarded as already born ;[2] and he established the rule that if property is left to X, and on his death without issue to Y, that means, in the case of personalty, that if X leaves no issue at his death, the property goes over, so that such a limitation does not offend the rule against perpetuities ; but that in the case of realty the construction placed on such a limitation is different ; for it gives an estate-tail to the issue, so that the limitation will take effect if, at any distance of time, the issue fails.[3] In the case of *Farrington v. Knightly*[4] he considered all the cases on the question when a legacy to an executor would bar his claim to the undisposed-of residue ; in the case of *Tipping v. Tipping*[5] he held that *bona parapherna* are only liable to creditors in the last resort ; and in the case of *Maxwell v. Wettenhall*[6] he summarized the rules as to when and from what time interest is payable on legacies. In the case of *Trott v. Dawson*[7] he decided that a trustee can assert his right to indemnity as against an assignee of his c.q. trust. In the case of *Powell v. Hankey and Cox*[8] he held that if husband and wife cohabited, and the husband was permitted to receive the income from his wife's separate property, the wife could not, after the husband's death, sue for an account of this money ; and in the case of *Cannel v. Buckle*[9] that a contract between a woman and her intended husband, though void at law, was valid in equity and could be specifically enforced. The position of the guardians of infants was elucidated in the case of *Duke of Beaufort v. Berty*[10] and the rules as to the persons to whom the custody of lunatics should be committed in *Mr. Justice Dormer's Case*.[11] The inconveniences of the common law writ of partition were mitigated by the principle that the court of Chancery would not insist upon a physical division, where this would damage the property, but would award a sum of money to produce equality ;[12] and the principle laid down in *The Earl of Bath v. Sherwin*[13] was explained and followed in the case of

[1] Turton v. Benson (1718) 1 P. Wms. at pp. 498-499 ; below 216.
[2] Hewet v. Ireland (1718) 1 P. Wms. 426 ; Burdet v. Hopegood (1718) 1 P. Wms. 486.
[3] Forth v. Chapman (1720) 1 P. Wms. 663 ; cp. Target v. Gaunt (1718) 1 P. Wms. 432 ; Pleydell v. Pleydell (1721) 1 P. Wms. 748.
[4] (1719) 1 P. Wms. 544 ; below 212, 279.
[5] (1721) 1 P. Wms. 729.
[6] (1722) 2 P. Wms. 26.
[7] (1721) 1 P. Wms. 780.
[8] (1722) 2 P. Wms. 82—a decision followed by King L.C. in the case of Thomas v. Bennet (1725) 2 P. Wms. 341 ; cp. Howard v. Digby (1834) 2 Cl. and Fin. 634.
[9] (1724) 2 P. Wms. 247.
[10] (1721) 1 P. Wms. 703 ; below 226 and n. 2.
[11] (1724) 2 P. Wms. 262.
[12] Earl of Clarendon v. Hornby (1718) 1 P. Wms. 446.
[13] (1710) 10 Mod. 1 ; above 198.

Leighton v. Leighton,[1] where an injunction was granted against bringing further actions of ejectment after two verdicts for the plaintiff. In the case of *Peachy v. Duke of Somerset*[2] he considered the principles upon which equity would relieve against penalties and forfeitures. Lastly, in the case of *De Costa v. Scandret*[3] he laid down the important principle that the contract of insurance is a contract *uberrimae fidei*, so that non-disclosure of a material fact is equivalent to fraud, and entitles the insurers to rescind the contract.

It is clear from these few illustrations that Parker's decisions were rapidly building up the doctrines of equity. From this point of view his fall was a misfortune; for Chief Justice King, his successor, failed to show the same ability as a Chancellor.

Peter King[4] was the son of a grocer and drysalter of Exeter, and for some years he followed his father's business. But he inherited from his mother, who was a cousin of John Locke, a taste for learning and literature; and Locke encouraged him in these pursuits. In 1691 he published an *Enquiry into the Constitution of the Primitive Church*, which reached a second edition in 1712-1713, and long remained a standard work on this subject;[5] and in 1702 he published a *History of the Apostles' Creed*—a learned piece of historical research which won the approval of theologians both abroad and at home.[6] The publication of the former work changed the course of King's life. Locke got his father to allow his son to go to the university of Leyden. He resided there for three years (1691-1694), and, on his return, determined to go to the bar. He became a student of the Middle Temple in 1694, and by the special favour of Treby, C.J., he was called in 1698. His own talents, seconded by the influence of Locke and Treby, C.J., ensured his success. He soon acquired a practice; and in 1701 he was elected a member of Parliament for the Whig borough of Beeralston. In 1704 he defended in the House of Commons the right of the electors of Aylesbury to bring actions against the returning officer who had refused to receive their votes. He became recorder of London in 1708; and his theological learning made him an effective manager in the impeachment of Sacheverell. In 1712 he appeared without fee for Whiston, who had been

[1] (1720) 1 P. Wms. 671. [2] (1721) 1 Stra. 447.
[3] (1723) 2 P. Wms. 170.
[4] D.N.B.; Foss, Judges viii 132-138; Campbell, Chancellors iv 567-647; King's Diary printed at the end of vol. ii of Lord King's Life of John Locke, and referred to as Diary.
[5] The writer of the article in the D.N.B. says that this book was not superseded till the publication of Edwin Hatch's Bampton Lectures in 1881.
[6] It was so well thought of abroad that it was translated into Latin; Campbell, op. cit. iv 574, says that "it is still recommended by bishops to candidates for holy orders."

condemned for heresy at Cambridge, and induced the court of Delegates to reverse the decision.[1] He also opposed a motion in the House of Commons to impeach Fleetwood, bishop of St. Asaph, for a published sermon, which was thought to reflect upon the government.[2]

By this time King had become a leader of the Whig party. On the accession of George I he was made, on Cowper's recommendation,[3] Chief Justice of the Common Pleas. His abilities as Chief Justice were recognized by all; and it is clear from his report to the King on the trials of persons implicated in the rebellion of 1715, that he was of a merciful disposition.[4] Both in civil and in criminal cases he showed all the qualities of a great lawyer;[5] and when he was Chancellor he showed that he had sufficient independence to resist even royal attempts to usurp his patronage.[6] When Parker resigned in 1725 King was made Speaker of the House of Lords, and, in that capacity, presided at Parker's trial. After the trial was over he was made Lord Chancellor; the choice was generally approved. Hervey, who was by no means an admirer of King,[7] said that

> he was perhaps the only instance that can be given of a man raised from the most mean and obscure condition to the highest dignity in the state without the malice of one enemy ever pretending to insinuate that the partiality of his friends, in any one step of this rise, had pushed him beyond his merit. He was made Chancellor as much by the voice of the public as by the hand of power.[8]

But Hervey adds that "that employment proved the vertical point of his glory."[9] He was not learned in equity. He did his best to learn; he made himself a competent equity lawyer; and he was continued in his office by George II. But he never sufficiently mastered what to him was new learning, to be quite at home with either the practice or the doctrines of his court.

That he made himself a competent equity lawyer some of his decisions show. One of the best known of his decisions is the leading case of *Keech v. Sandford*[10] which decided that if a trustee renews a lease in his own name, even though the lessor

[1] 15 S.T. 703; Campbell, op. cit. iv 588.
[2] Ibid 589-590; Foss, op. cit. viii 135.
[3] Campbell, op. cit. iv 349 *note*; above 197.
[4] Campbell, op. cit. iv 595-598.
[5] Ibid iv 594; Foss, op. cit. viii 135; below 213.
[6] King tells us in his Diary at pp. 47-48 that George II "told me he expected to nominate to all benefices and prebendaries that the Chancellor usually nominated to. I told him, with great submission, that this was a right belonging to the office annexed to it by Act of Parliament and immemorial usage, and I hoped he would not put things out of their ancient course. . . . I did not give up this point . . . and afterwards, at another time, he told me that I should go on as usual."
[7] Below 213.
[8] Memoirs of the Reign of George II i 285-286.
[9] Ibid 286.
[10] (1726) Cas. t. King 61.

has refused to renew in the name of the c.q. trust, he holds the renewed lease as a trustee. In the case of *Mansell v. Mansell* [1] he, together with Raymond, C.J., and Reynolds, C.B., settled that the rule laid down by Lord Keeper Harcourt and the House of Lords,[2] that a trustee to preserve contingent remainders, who joins in destroying them, is guilty of a breach of trust, applies to voluntary settlements as well as to settlements for a valuable consideration. In the cases of *Keylway v. Keylway* [3] and *Holt v. Frederick* [4] he settled important questions of interpretation arising out of the statutes of Distribution; and the latter case is an authority on the question whether a sum of money given by a mother to a child can ever be presumed to be an advancement to the child.[5] In the case of *Coppin v. Coppin* [6] he decided that a will of English land, though made abroad, must be made in accordance with the formalities prescribed by English law. The case of *Croft v. Pyke* [7] asserted the principle that the joint estate of partners was liable in the first place to partnership debts, and the separate estate of each partner was liable in the first place to his separate debts. In the case of *Shepherd v. Beecher* [8] he held that a surety who guarantees the honesty of X, and who, hearing of X's dishonesty, does not put an end to the contract of suretyship, will be liable for X's future acts of dishonesty up to the limits of the guarantee. In the cases of *Milner v. Colmer* [9] and *Brown v. Elton* [10] he enforced the wife's equity to a settlement, but showed that he did not much like the equitable rule because it diminished the husband's legal rights, and because it had proved, in his opinion, to be inconvenient, except in cases where the husband was profligate or extravagant.[11] Later cases have rightly refused to follow his view that if a legacy is given both to an executor and to the next-of-kin, an equal presumption is created in both cases that their legal rights to the residue are barred, and that therefore, it "being exclusion against exclusion, the law must take place, and the executor have the surplus as executor." [12]

[1] (1732) 2 P. Wms. 678.
[2] Above 202.
[3] (1726) 2 P. Wms. 344.
[4] Ibid 356.
[5] See Bennet v. Bennet (1879) 10 C.D. at p. 478.
[6] (1725) 2 P. Wms. 291.
[7] (1733) 3 P. Wms. 180.
[8] (1725) 2 P. Wms. 288; cp. Phillips v. Foxall (1872) L.R. 7 Q.B. at p. 679.
[9] (1731) 2 P. Wms. 639.
[10] (1733) 3 P. Wms. 202.
[11] "He thought it extraordinary that this Court should interpose against the husband in cases where the law gives him a title to the wife's personal estate; and doubted, experience had shewn, that such interposition, unless where the husband has appeared to be a profligate or extravagant man, had been the occasion rather of mischief than good," 2 P. Wms. at p. 642; but he admitted that the practice of the court was settled in the contrary sense, 3 P. Wms. at p. 205.
[12] Atty.-Gen. v. Hooker (1725) 2 P. Wms. 338 at p. 340; cp. Andrew v. Clark (1750-1751) 2 Ves. Sen. 162 and Belt's note; another case in which one of his decisions was reversed was Glissen v. Ogden (1731) 2 Atk. at pp. 258-259.

We have seen that he carried through the reforms which deprived the Masters of their control of the suitors' money and vested it in the Accountant-General of the court of Chancery ; [1] and that it was during his Chancellorship that the position of the Master of the Rolls as a deputy judge of the court of Chancery was settled.[2] He tried without much success to make other reforms in the practice of the court—vested interests were too strong ; [3] and he was sometimes thwarted by Jekyll, M.R.,[4] who was an abler equity lawyer than himself.[5]

Though King added something to equitable doctrine, his consciousness that he was something of an amateur made him very diffident, and therefore very slow ; and the fact that his decisions were criticised, and sometimes reversed, tended to aggravate these failings. Hervey said of him that

> he had such a diffidence of himself, that he did not dare to do right for fear of doing wrong ; decrees were always extorted from him ; and had he been let alone, he would never have given any suitor his due for fear of giving him what was not so.[6]

Hardwicke once said of him that it was common knowledge that he was "as willing to adhere to the common law as any judge that ever sat here." [7] There was possibly a substratum of truth in the view taken by Hervey and Queen Caroline that his eminence as a pleader made him the less fit to preside in the court of Chancery ; [8] but there is no doubt that they exaggerated when they insinuated that it had made him a bad Chief Justice of the Common Pleas. We have seen that Hervey himself admitted that he had deservedly won a great reputation while holding that office.[9] And his services to the law did not end when he became Chancellor. As Chancellor he set on foot an enquiry into the fees taken in all the courts ; [10] and in spite of the opposition of his brethren, he carried the Act which required the records and process of the courts of law to be drawn

[1] Vol. i 440 and n. 4 ; 12 George I cc. 32 and 33.
[2] Vol. i 421 ; 3 George II c. 30 ; below 221 n. 5.
[3] See Campbell, op. cit. iv 639-640.
[4] Thus in 1725 Jekyll objected to his order that the Usher should be under the same regulations as the Masters, and to his settlement of his fees, Diary 18-19.
[5] Below 219-222.
[6] Memoirs of the Reign of George II i 286.
[7] Le Neve v. Le Neve (1748) 3 Atk. at p. 654.
[8] "His understanding was of that balancing, irresolute kind that gives people just light enough to see difficulties and form doubts, and not enough to surmount the one or remove the other ; which sort of understanding was of use to him as a pleader though a trouble to him as a judge. . . . The Queen once said of him . . . that 'he was just in the law what he had formerly been in the Gospel—making creeds upon the one without any steady belief, and judgments in the other without any settled opinion ; but the misfortune,' said she, 'for the public is, that, though they could reject his silly creeds, they are forced often to submit to his silly judgments,'" Memoirs of the Reign of George II i 286-287.
[9] Above 211.
[10] Campbell, op. cit. iv 640.

up in English.[1] But at the end of his career the burden of work and anxiety undermined his health.[2] In spite of all his exertions arrears piled up; and his attempt to cope with them by sitting late was not successful. Bentham's father[3] said that he often dozed over his cases; and that they were in effect often settled by the two leaders in the court—Yorke and Talbot.[4] His health gave way entirely, and he resigned November 29, 1733. He died July 29, 1734.

His successor, Lord Talbot,[5] was born in 1685. He was the eldest son of William Talbot, who was successively bishop of Oxford, Salisbury, and Durham. He was a member of Oriel College, and, on taking his degree in 1704, he was elected a fellow of All Souls College. He was dissuaded from carrying out his original intention of taking orders by Lord Cowper, and, on Cowper's advice, adopted the law as his profession. He was called to the bar by the Inner Temple in 1711. He soon acquired a leading practice in the court of Chancery, and became a member of Parliament in 1719. He was made solicitor-general in 1726; and, whilst solicitor-general, he made a very able speech in defence of Walpole's excise scheme.

Yorke and Talbot, the attorney and solicitor-general, were the most eminent barristers of their day, and the leaders of the Chancery bar. We have seen that, in the latter capacity, they did much to mitigate the evil consequences to the suitors, which followed from the physical incapacity from which Lord Chancellor King suffered in the last years of his chancellorship;[6] and it was clear that one or other of them would soon be his successor. The situation was complicated by the death of Lord Raymond, Chief Justice of the King's Bench on March 19,

[1] 4 George II c. 26; vol. ii 479; vol. xi 603; Bl. Comm. iii 322-323.

[2] As early as November 1727 he told the Duke of Newcastle, who had asked him to come back to town, that "my constant and continual application to the business of the Court of Chancery had brought upon me rheumatical and sciatical pains; and if I had any regard to myself or family, I must for remedy stay three or four days in the country," Diary 53.

[3] It is clear from the letter printed by Cooksey, Sketches of the Lives of Somers and Hardwicke, that it was written by Bentham's father, and not by his more celebrated son, see Cooksey's note at the end of the letter; the writer of the letter says that he speaks from his own observation, see next note, and Bentham's son was not born till 1748.

[4] "Lord King became so far advanced in years . . . that he often dozed over his causes when upon the bench; a circumstance which I myself well remember was the case; but it was no prejudice to the suitors; for Sir Philip Yorke and Mr. Talbot were both men of such good principles and strict integrity, and had always so good an understanding with one another, that, although they were frequently, and almost always, concerned for opposite parties in the same cause, yet the merits of the cause were no sooner fully stated to the court, but they were sensible on which side the right lay; and, accordingly, the one or other of these two great men took occasion to state the matter briefly to his Lordship, and instruct the Registrar in what manner to minute the heads of the decree," Cooksey, op. cit. 60.

[5] D.N.B.; Foss, Judges viii 169-173; Campbell, Chancellors iv 648-687.

[6] Above n. 4

1733. Yorke had, as attorney-general, a prior claim to the chancellorship; but, since he was as good a common lawyer as an equity lawyer, he was as well fitted to be Chief Justice of the King's' Bench as Lord Chancellor. On the other hand, Talbot's practice was almost exclusively an equity practice, so that he would not have made a good Chief Justice. The accounts given by Hervey and by Bentham's father [1] of the manner in which the difficulty was settled are substantially similar; and they are corrborated by the fact that a delay of two terms took place in filling the vacant chief justiceship.[2] Hervey says: [3]

> Upon the corporal death of my Lord Chief Justice Raymond, and the intellectual demise of Lord Chancellor King, these two men, Sir Philip Yorke, and Mr. Talbot, were destined to succeed them; but the voracious appetite of the law in those days was so keen, that these two morsels without any addition were not enough to satisfy these two cormorant stomachs. Here lay the difficulty: Sir Philip Yorke, being first in rank, had certainly a right to the Chancellor's seals; but Mr. Talbot, who was an excellent Chancery lawyer and knew nothing of the common law, if he was not Chancellor would be nothing. Yorke, therefore, though fit for both these employments, got the worst, being prevailed upon to accept that of Lord Chief Justice, on the salary being raised from £3,000 to £4,000 a year for life, and £1,000 more paid him out of the Chancellor's salary by Lord Talbot.[4] This was a scheme of Sir Robert Walpole's, who, as Homer says of Ulysses, was always fertile in expedients, and thought these two great and able men of too much consequence to lose or disoblige either. Sir Robert communicated this scheme secretly to the Queen. She insinuated it to the King, and the King proposed it to Sir Robert as an act of his own ingenuity and generosity.

In furtherance of this arrangement Yorke was made Chief Justice of the King's Bench on October 31, 1733, and on November 24 was created a peer with the title of baron Hardwicke. Talbot was made Lord Chancellor on November 29, 1733, and on December 15 was created a peer with the title of baron Talbot of Hensol.[5] His promotion was celebrated in the Inner Temple by the last of that series of revels for which the Inns of Court had once been famous.[6] After holding the Great Seal

[1] Cooksey, op. cit. 59.

[2] P. C. Yorke, Life of Lord Hardwicke i 117; but cp. Foss, Judges viii 188-189 who discredits the truth of this episode; but as Mr. Yorke points out, loc. cit., the length of time taken to fill the post of Chief Justice, coupled with the fact that Lord King's resignation was obviously imminent, confirms the story; and he points out that "from a passing allusion by Lord Hardwicke in a letter to a correspondent a short time afterwards, it may be inferred that he was actually offered the Great Seal and that he declined it."

[3] Memoirs of the Reign of George II i 284-285.

[4] Bentham says that Yorke refused to accept this increase of salary "without its being made permanent to the office of Chief Justice of that Court, by being secured to his successors," Cooksey, op. cit. 59.

[5] It was apparently a part of the arrangement that Hardwicke was to have the senior title, P. C. Yorke, op. cit. i 118 n. 4.

[6] See Wynne, Eunomus iv 104-108 for an account of it; for earlier revels see vol. iv 267-268; above 16.

for only four years he died of inflammation of the lungs on February 14, 1737.

Contemporary opinion is clear that Yorke and Talbot were the two ablest lawyers, the two best judges, and two of the most charming personalities of their day. Hervey says : [1]

> Lord Talbot had as clear, separating, distinguishing, subtle, and fine parts as ever man had. Lord Hardwicke's were perhaps less delicate, but no man's were more forcible. No one could make more of a good cause than Lord Hardwicke, and no one so much of a bad one than Lord Talbot. The one had infinite knowledge, the other infinite ingenuity : they were both excellent, but very different ; both amiable in their private characters, as well as eminent in their public capacities ; both good pleaders, as well as upright judges ; and both esteemed by all parties, as much for their temper and integrity as for their knowledge and abilities.

Talbot's decisions show that this appreciation of his abilities was justified—some of them are still landmarks in the history of equity. They show also that equity was rapidly becoming a fixed body of doctrine which supplemented and corrected the law in certain defined ways, and, consequently, that the ground was well prepared for the great work of consolidation effected by his successor Lord Hardwicke.[2] In fact, if Talbot had lived longer, his name, and not that of Hardwicke, would probably have been associated with this penultimate phase in the history of the development of equitable doctrine. A rapid glance at some of his decisions will prove the truth of this proposition.

Talbot pointed out that it was the province of equity to give relief in matters falling within the jurisdiction of the court " though nothing appears which, strictly speaking, may be called illegal." [3] Thus it would relieve against oppression, even though no actual fraud or duress could be proved—" it being the business of this court to relieve against all offences against the law of nature or reason." [4] It was on this ground that he ordered the return of money overpaid in pursuance of an usurious contract, although the payer was *particeps criminis ;* for it cannot be said " in any case of oppression that the party oppressed is *particeps criminis*, since it is that very hardship that he labours under, and which is imposed on him by another, that makes the crime." [5] It was on this ground also that the court gave relief in all cases where undue influence could be proved.

> The rule that a mischief is rather to be suffered than a general inconvenience does not at all affect this case ; for it would be a much greater inconvenience to leave men under difficulties and distresses

[1] Memoirs of the Reign of George II i 285. [2] Below 257 seqq.
[3] Bosanquet v. Dashwood (1734) Cases t. Talbot at p. 40.
[4] Ibid. [5] Ibid at p. 41 ; below 274-275.

open to all the oppression that other people may please to make them undergo. This is the reason upon which the court relieves against bonds given by young heirs and marriage brocage bonds; and will not suffer any advantage to be taken of the extravagance and want of judgment in the one case, and of the strong bias to obtain what is desired in the other.[1]

On the other hand, Talbot recognized that there were injustices and inconveniences against which equity could give no relief:

Where a particular remedy is given by law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this Court to take it up where the law leaves it, and extend it farther than the law allows.[2]

Thus the liability of a husband to pay his wife's debts ceased at law when the wife died,[3] and equity could do nothing for the creditors, even though the husband had had a large fortune with his wife.[4] Talbot admitted that this was hard on her creditors, but it was a hardship which only the Legislature could remedy.[5]

Just as the principles upon which equity could interfere to prevent injustice, and the limitations upon its power to interfere, were becoming settled, so also were many of the doctrines to which its interference had given rise. The following cases are a few illustrations of this fact. In the case of *Hopkins v. Hopkins* [6] rules were laid down as to when a limitation could be construed to be an executory devise, and when a contingent remainder; [7] and the principle that, in construing an executory devise, every effort must be made to give effect to the intention of a testator was asserted.[8] In the case of *Chapman v. Blissett* [9] the rule was laid down that an equitable contingent remainder would not fail on account of abeyance of the seisin, because the legal estate was in the trustees. In the case of *Glenorchy v. Bosville* [10] the reason for the different way in which executed and executory trusts were construed was explained; and, in the case of *Legg v. Goldwire*,[11] the rules as to when a settlement can be corrected by the marriage articles were stated. The case of

[1] Proof v. Hines (1735) Cases t. Talbot at p. 116; below 274, 275.
[2] Heard v. Stanford (1736) Cases t. Talbot at p. 174; below 227, 261-262, 270.
[3] Vol. iii 531.
[4] Heard v. Stanford (1736) Cases t. Talbot 173.
[5] "The case perhaps may be hard, but the law hath made it so, that it may be equal on both sides, as well where the husband is sued during the coverture, for a debt of the wife's, with whom he had no fortune, as where he by her death is discharged from all her debts, notwithstanding any fortune he may have received in marriage with her; so is the law, and the alteration of it is the proper work of the Legislature only," ibid at p. 174.
[6] (1734) Cases t. Talbot 44.
[7] See vol. vii 127.
[8] Cases t. Talbot at pp. 50-51.
[9] (1735) Cases t. Talbot 145 at p. 151; vol. vii at p. 149.
[10] (1733) Cases t. Talbot 3 at p. 19; below 272.
[11] (1736) Cases t. Talbot 20; below 277, 281.

Lechmere v. Earl of Carlisle [1] is a leading case on the doctrines of conversion and satisfaction; and the case of *Streatfield v. Streatfield* [2] on the doctrine of election. The case of *Cookson v. Duke of Somerset* [3] lays down the rule as to the circumstances in which the court would order the specific restitution of a chattel. Previous cases had been somewhat conflicting; [4] but this case, and the earlier case of *Pusey v. Pusey*,[5] showed that the court would only exercise this jurisdiction in the case of heirlooms or chattels of peculiar rarity. The case of *Stapleton v. Colville* [6] is an authority on the vexed question of the circumstances in which the personal estate is exonerated from its primary liability to pay the debts of a deceased person; and the case of *Morrice v. Bank of England* [7] on the application of legal and equitable assets in the payment of debts,[8] and on the rights of those creditors, who had got a judgment at common law, and of those who had got a decree in equity. It was settled that, whatever might be the case at law, in equity decrees and judgments stood on an equal footing.[9] Lastly, we have seen that *Barbuit's Case* [10] is a leading case on the privileges of ambassadors and their retinue, and of consuls, and on the interpretation of the statute of 1708,[11] which was passed in consequence of the arrest of the Czar's ambassador.

Of the career of the first of the Masters of the Rolls during this period—John Trevor—I have already spoken.[12] Though he was an unscrupulous politician, brutal in his manners, avaricious, and unprepossessing in appearance, there is no doubt that he was an able lawyer. His decision in the case of *Benson v. Benson* [13] is an early authority on the subject of reconversion. His decision in the case of *Waring v. Danvers* [14] is authority for the proposition that from legal assets executors had the same right of retainer and preference in equity as they had at law; and that, after an action at law brought by one creditor, the executor could give a preference to another creditor by confessing judgment to him. In an anonymous case he laid

[1] (1733) 3 P. Wms. 211; S.C. on appeal sub. nom. Lechmere v. Lechmere (1735) Cases t. Talbot 80; below 269, 270, 324.
[2] (1736) Cases t. Talbot 176; below 270.
[3] (1735) 3 P. Wms. 390.
[4] Above 208; below 221 n. 9, 232-233.
[5] (1684) 1 Vern. 273.
[6] (1736) Cases t. Talbot 202.
[7] Ibid 217.
[8] At p. 220; below 280.
[9] Cases t. Talbot at p. 223; and it was pointed out that the common law rule that the judgment related back to the first day of the term must be disregarded, and the court must look at the exact date in order to see whether the judgment creditor or the decree creditor had the prior right.
[10] (1737) Cases t. Talbot 281; vol. x 371-372.
[11] 7 Anne c. 10; vol. x 370-371.
[12] Vol. vi 549-550.
[13] (1710) 1 P. Wms. 130.
[14] (1715) 1 P.Wms. 295.

down the rule that a bequest to relations means a bequest to relations capable of taking under the statutes of distribution.[1] Lord Campbell credits him with having been the first to lay down the rule that the marriage of a testator and the birth of a child will revoke his will;[2] but it would seem that he only followed an earlier decision to this effect, and later referred to it with approval.[3] In another case he had the courage to differ from a decision of the House of Lords, saying that if the case came again before the House it would decide differently;[4] but his successors recognized that the decisions of the House could not be treated in this way.[5]

Trevor died in 1717, and his successor as Master of the Rolls was Sir Joseph Jekyll[6]—that

> Odd old Whig
> Who never changed his principles or wig.[7]

He was connected by marriage with two great Chancellors of very different dates—with Somers whose sister he had married, and with Hardwicke who had married his wife's niece.[8] He was born about 1663, and was called to the bar by the Middle Temple in 1687. From the first he had identified himself with the Whig party, and never wavered in his allegiance during the forty years (1698-1738) that he was a member of the House of Commons.[9] He became chief justice of Chester in 1697, and a serjeant-at-law in 1700. In the Aylesbury case he defended the right of the electors to bring actions at law, and he incurred the censure of the House of Commons by appearing in defence of Halifax, when he was prosecuted by order of the House in

[1] Anon. (1716) 1 P. Wms. 327. [2] Chancellors iv 59.

[3] Cook v. Oakley (1715) 1 P. Wms. at p. 304 and note (3) where it is said that the original case was Eyre v. Eyre, which Trevor said was reported to him by Treby C.J. and some eminent civilians; also it would seem that in 1701 he held that marriage and the birth of a child revoked a will of land; this case was reversed by Wright L.K. on the facts, ibid; there was considerable authority for the view that the revocation was presumptive only, so that evidence to rebut the presumption was admissible, see Brady v. Cubit (1778) 1 Dougl. 31; but Trevor's view was preferred by the Exchequer Chamber in Marston v. Roe (1838) 8 Ad. and E. 14, see pp. 61-62.

[4] "And it being said by Mr. Pooley that . . . it had been decreed in the House of Lords, that they would not supply the want of a surrender in case of a devise of a copyhold to grandchildren . . . to this the Master of the Rolls answered, that it was his opinion, such a devise of a copy hold, without a surrender, ought to be made good for grandchildren, as well as children; and if the same case were to come *now* into the House of Lords, it would be so ruled, and that he had, and would so decree it," Watts v. Bullas (1702) 1 P. Wms. at p. 61.

[5] Tudor v. Anson (1754) 1 Ves. Sen., 582 *per* Lord Hardwicke; Perry v. Whitehead (1801) 6 Ves. at p. 547, *per* Lord Eldon.

[6] D.N.B.; Foss, Judges viii 127-131.

[7] Pope, Epilogue to the Satires, Dialogue I.

[8] P. C. Yorke, Life of Hardwicke i 69.

[9] He was member for Eye 1698-1714, for Lymington 1714-1722, for Reigate 1722-1738.

1704. In 1710 he opened the first article on the impeachment of Sacheverell, and was so keen on the prosecution that he tried to prosecute a Welsh clergyman who in a sermon had reflected upon the conduct of the managers.[1] On the accession of George I he was on the committee of secrecy which was appointed to enquire into the conduct of the late ministry. His opinion was that there was sufficient evidence to support an impeachment for treason against Bolingbroke, but not against Oxford. However, Oxford was impeached, and though in June 1717 he was still of opinion that there was not sufficient evidence to impeach for treason, a fortnight later he opened the first article—probably he was aware that it had been arranged that the impeachment was not to be seriously prosecuted.[2] In 1715 he had assisted the government by taking part in the prosecution of some of the rebels.[3] He thus deserved his appointment as Master of the Rolls on Trevor's death in 1717. He held this office till his death in 1738.

He did not cease to be an active member of the House of Commons on his appointment to this office. He was energetic in exposing the scandals connected with the South Sea Bubble. He proposed and carried the famous Gin Act,[4] which so enraged the people that he was attacked by the mob, and it was necessary to provide a guard for his house. He was also the author of the Charitable Uses Act of 1736;[5] and he proposed an Act, for the benefit of the Quakers, which substituted a lay for an ecclesiastical court as the tribunal before which proceedings for non-payment of tithe were to be instituted. The latter Act had the support of Walpole and passed the House of Commons,[6] but the opposition of Lords Talbot and Hardwicke,[7] on account of the impracticable nature of its provisions,[8] secured its rejection in the Lords. He showed his prescience as a statesman when, in 1716, he suggested that the heritable jurisdictions of the Highland chiefs should be abolished.[9] He was, as Pope said, an old Whig who never deserted his principles—"his principal topics of declamation in the House," says Hervey,[10] "were generally economy and liberty." Hervey's sketch of

[1] The grand jury threw out the bill, Foss, Judges viii 129.

[2] Campbell, Chancellors iv 369-376, 486-487; above 202.

[3] He was one of the managers on the impeachment of the Earl of Winton, and opened the case against him, 15 S.T. 830; and he appeared for the Crown on the indictment of Francis Francia, ibid 904.

[4] 9 George II c. 23; vol. x 184. [5] 9 George II c. 36; vol. xi 590-593.

[6] Hervey, Memoirs of the Reign of George II ii 262-263.

[7] Ibid 270-271.

[8] P. C. Yorke, Life of Hardwicke i 149-150; Hervey's insinuation, op. cit. ii 270-271, that Talbot and Hardwicke acted from the desire to forward the interests of their own profession is obviously wrong.

[9] P. C. Yorke, op. cit. i 590-591. [10] Op. cit. ii 141.

his character is no doubt biassed and ill-natured, largely it would seem because he had defeated the Court in 1736 on the Marlborough election petition, by a legal argument which the Crown lawyers were unable to answer.[1] But even he is obliged to admit, that though his old-fashioned prejudices were laughed at, he " spoke with more general weight, though with less particular approbation, than any other single man in that assembly." [2]

He was a very competent lawyer—some thought that he would have been made Lord Chancellor in succession to Cowper ; [3] and he was a better equity lawyer than Lord King, with whom he did not always see eye to eye.[4] We have seen that it was during Lord King's tenure of office that the dispute arose as to the judicial authority of the Master of the Rolls, which was in effect settled by the argument of his nephew Philip Yorke in favour of that authority.[5] Such cases as *Turton v. Benson* [6] and *Lechmere v. Lord Carlisle* [7] show that he had a firm grasp of equitable principle. It is true that some of his decisions were reversed. But in some of them, e.g. in the case of *Cud v. Rutter*,[8] there is a good deal to be said for the opposite conclusion ; [9] and in others, e.g. in the cases of *Banks v. Sutton*,[10] *Casburne v. Scarfe*,[11] and *Hervey v. Aston*,[12] his judgments show great mastery of principles, a thorough knowledge of the relevant authorities, and a power of lucid exposition. In the last-named case Lord Hardwicke said that, though he differed from the Master of the Rolls, he had the utmost deference for his judgment.[13]

His old Whig prejudice for economy was illustrated by the bequest in his will of £20,000, after his wife's death, to the sinking fund for the reduction of the national debt—" he might as well," said Lord Mansfield, " have attempted to stop the middle arch of Blackfriars Bridge with his full bottomed wig." As a matter of fact this bequest did not take effect, because the government consented to the passing of an Act [14] giving up its right to the greater part of this legacy, on the ground that Jekyll had been at great expense in rebuilding the Rolls House and the adjacent premises, under the mistaken impression that

[1] Hervey, op. cit ii 138-140.
[2] Ibid 141.
[3] Campbell, Chancellors iv 522.
[4] Above 213.
[5] Vol. i 420-421 ; above 213; though there is some evidence that Jekyll had a hand in its composition the better view seems to be that it was the work of Yorke, P. C. Yorke, Life of Hardwicke i 96 n. 1.
[6] (1718) 1 P. Wms. 496.
[7] (1733) 3 P. Wms. 211.
[8] (1719) 1 P. Wms. 570.
[9] Ibid at p. 571 n. 1 it is said that " cases of this kind [contracts to buy stocks or shares] depend so much on their own particular circumstances, that it seems no general rule can be laid down " ; cp. Colt v. Netterville (1725) 2 P. Wms. 304 where an opposite conclusion was come to in respect of a contract to buy York-Buildings stock.
[10] (1732) 2 P. Wms. 700.
[11] (1737) West t. Hard. 221.
[12] (1737) West t. Hard. 350.
[13] At p. 414.
[14] 20 George II c. 34.

he was able to grant long leases of these premises, with the result that the value of his estate was much diminished.

The developments of equitable doctrine made by these Chancellors and Masters of the Rolls were summed up in Ballow's *Treatise*, which was published in 1737.[1] That *Treatise* comes at the end of a very distinct epoch in the history of equity —the epoch which stretches from the chancellorship of Nottingham to the beginning of the chancellorship of Hardwicke. It was an epoch during which the principles and rules of equity were being rapidly developed, and this rapid development continued throughout the eighteenth century, and during the first three decades of the nineteenth century. Because Ballow's *Treatise* comes at the end of the earlier part of this period of rapid development, we can see in his book both the connection between the later fixed principles and rules of equity and the original bases upon which equitable modifications of and additions to the law rested, and the manner in which these principles and rules were developed from isolated modifications of and additions to the law in particular cases on grounds of fairness and justice. Ballow's acquaintance with all the authorities ancient and modern, and his philosophical turn of mind, which led him to try and reduce to some principle the scattered and often nebulous principles and rules of equity, made him an admirable exponent of this phase of the development of equitable doctrine.

In the first place, he insists at the outset on the philosophical principle upon which equitable interference with the law had from the first been based; and at many places in his book he tries to base a doctrine of equity on a general principle of acknowledged truth. But, in the second place, he admits that there are limitations upon the application of these principles, and, consequently, upon the power of equity to interfere with the law, and that the established rules of equity ought to be followed. Thirdly, because the development of a regular and a fixed system of equitable principles and rules was in its initial stage, the rules laid down in some of the cases were then more closely connected with the original wide principle on which equitable interference with the law was based than they were later, with the result that some very loose doctrines are sometimes laid down which were later rejected. But, fourthly, though in very many cases the settled principles and rules of equity are apparent, some of these principles and rules were then more flexible than they became later in the century, because they were more closely connected with the bases upon which they originally rested. An examination of the manner in which Ballow treats the

[1] Above 191-192.

principles and rules of equity from these four points of view will give us some idea of the stage which the development of equitable doctrine had reached before the time of Lord Hardwicke.

(1) *Ballow insists at the outset on the philosophical principle upon which equitable interference with the law had from the first been based; and at many places in his book he tries to base a doctrine of equity on a general principle of acknowledged truth.*

We have seen that the author of *The Doctor and the Student* had adopted the views of mediæval thinkers, and had laid it down that mankind was governed primarily by the laws of God or Nature, and only secondarily by the human laws of the State;[1] that he had explained that a human law, though consonant to these higher laws and therefore valid, might, by reason of the general terms in which it was expressed, cause injustice or unfairness in particular cases; and that, following Aristotle,[2] he had based the need for equity upon injustices or unfairnesses so caused.[3] We have seen also that Lord Ellesmere had accepted this principle as the basis of, and the justification for, equitable interferences with the laws;[4] that it was for this reason that the rules of equity necessarily followed and depended upon the law to which they were a supplement, or on which they were a gloss;[5] and that, since their existence and content depended on the question whether any given body of law needed to be thus supplemented or glossed, they were necessarily somewhat disparate, and easily lent themselves to an exposition which took the form of a commentary on certain maxims or principles.[6] Ballow bases the need for a system of equity on these principles. He says:[7]

> Equity therefore, as it stands for the whole of natural Justice, is more excellent than any human Institution; neither are positive Laws, even in Matters seemingly indifferent, any further binding, than they are agreeable with the Law of God and Nature. But the Precepts of the natural Law, when enforced by the Laws of Man, are so far from losing any Thing of their former Excellence that they receive an additional Strength and Sanction. Yet as the Rules of the municipal Law are finite, and the Subject of it infinite, there will often fall out Cases, which cannot be determin'd by them; for there can be no finite Rule of an infinite Matter, perfect. So that there will be a Necessity of having Recourse to the natural Principles; that what was

[1] Vol. iv 279-280.

[2] See Vinogradoff, Outlines of Historical Jurisprudence ii 63-65; Aristotle says in the Ethics (cited ibid 64), "The nature of the equitable is the correction of law, inasmuch as law falls short of what is required by the universal terms in which it is expressed. This (deficiency) is the reason why all things cannot be regulated by law, so that decrees are required; that which does not admit of definition must be governed by indefinite rules."

[3] Vol. iv 280.

[4] (1616) 1 Ch. Rep. at p. 6, cited vol. i 453.

[5] Vol. iv 282.

[6] Above 190-191.

[7] A Treatise of Equity 2-3.

wanting to finite, may be supplied out of that which is infinite. And this is what is properly called Equity in Opposition to strict Law; and seems to bear something of the same Proportion to it in the moral, as Art does to Nature in the material World. For as the universal Laws of Matter would in many Instances prove hurtful to Particulars, if Art were not to interpose and direct them aright; so the general Precepts of the municipal Law would oftentimes not be able to attain their End, if Equity did not come in Aid of them. And thus in Chancery every particular Case stands upon its own particular Circumstances; and altho' the Common Law will not decree against the general Rule of Law, yet Chancery doth, so as the Example introduce not a general mischief. Every matter therefore, that happens inconsistent with the Design of the Legislator, or is contrary to natural Justice, may find Relief here. For no Man can be obliged to any Thing contrary to the Law of Nature, and indeed no Man in his Senses can be presumed willing to oblige another to it.

Equity therefore must as a general rule follow the law; and Ballow points out that, if there are no circumstances which make it inequitable that the law should be followed, the Chancellors have always pursued this course.

Where the Intent of the Parties does not specially appear, it is intended to agree with the Rules of Law. And therefore the Chancellors, in Case of an Use, often adjudg'd by Imitation of the Rules of Law, and according to the Nature and Quality of the Land; as in Case of *de possessione fratris*, Borough English, Gavelkind, Lands on the Mother's side etc. . . . So the Widow of the *Cestuy que Trust* of a Copyhold Estate, ought to have her Freebench or Widow's Estate, as well as if the Husband had had the legal Estate in him: And then it may be said, that *Æquitas sequitur legem*. So a Tenant by the Curtesy, shall be decreed of a Trust as well as of a legal Estate.[1]

On the other hand, he claims for equity a freer hand in the development of equitable estates than equity, in the interests of the uniformity of the rules of the law of property, ultimately took.[2] Thus, in conformity with some earlier decisions,[3] he said that an equitable estate tail could be "alien'd without a Recovery by any Manner of Conveyance."[4] We have seen[5] that the law was settled in the opposite way by Lord Hardwicke on the ground that the admission of this principle "would be to confound the rules of property," and "to make a determination in equity contrary to the rules of law."[6] On the other

[1] Op. cit. 62; he points out that in the case of dower equity did not follow the law—"tho' no Manner of Reason can be given for it if it were *res integra*"; as to this see vol. iii 196 and n. 10; vol. vii 148.

[2] "As for a Trust or equitable Interest it is a Creature of their own, and to be govern'd by their Rules," op. cit. 33.

[3] Vol. vii 148 nn. 10, 11, 12. [4] Op. cit. 33. [5] Vol. vii 148.

[6] Kirkham v. Smith (1749) Ambler at p. 519; Ballow would not have disapproved as he says, op. cit. 33, "yet some have thought the Method of common Recoveries a very prudent and political Institution, and fit to be follow'd in Equity, that Men may have some Restraint from overturning the Settlements of their Family."

hand, we shall see that this claim that equity could make its own rules for equitable estates was acted upon when, at the end of the century, Lord Thurlow invented the restraint against anticipation.[1]

On the same principle, in cases concerning wills and legacies of personal property, the ecclesiastical law must be followed ;[2] and it was due to this following of the ecclesiastical law " that a Bequest of the same Sum by the Debtor to the Creditor, shall be applied in Satisfaction of the Debt." [3] Likewise in appropriate cases the maritime law, as applied by the court of Admiralty, must be followed.[4] But since to use the words of Holt, C.J., " the common law is the over-ruling jurisdiction in this realm," [5] it is and always has been the rules of the common law which have been the principal basis upon which the rules of equity have been built up. Thus if the rules laid down by the common law courts and the rules laid down by the court of Admiralty conflicted, it was the former rules that the court of Chancery followed.[6]

Just as Ballow is careful to explain the philosophical basis upon which equity rested, so, in several places in his book, he gives a philosophical explanation of the principle or rule of equity which he is expounding. Thus, at the very beginning of his second Book, he lays down the broad principle, which underlies many applications of the trust concept, that " whoever has the Possession of Goods or Lands, either hath the absolute Property or Estate in them by a sufficient title ; or, so far as this is wanting, is considered as a Trustee for the true Owner." [7] As an explanation of the favour shown by the

[1] Below 325-326.

[2] Ballow, op. cit. 99-100 ; cp. Hudson v. Hudson (1735) Cases t. Talbot 127 where the court heard an argument from the civilians on the question whether, if administration is granted to two persons and one dies, the right to administer survives.

[3] " And the Canonists, whom our Resolutions have follow'd, have expounded these Wills, as the Civilians did the *Testamenta militaria*, viz., according to the Intent. And therefore, altho' a Legacy is to be taken as a Gift, yet a Man shall be taken to be just before he is kind. So that a Bequest of the same Sum by the Debtor to the Creditor, shall be applied in Satisfaction of the Debt," ibid 100 ; Talbot v. Duke of Shrewsbury (1714) Prec. in Ch. 394 ; below 269.

[4] In the case of Allport v. Thomas (1725) Gilb. Rep. at p. 227 Gilbert C.B. said that " though this case was within the mercantile law, yet it being admitted by the answer that the charge was for tackling etc., a court of equity must grant them the redress as a court of Admiralty would, viz., upon the bottom of the ship."

[5] Shermoulin v. Sands (1697) 1 Ld. Raym. at p. 272.

[6] Watkinson v. Bernardiston (1726) 2 P. Wms. 367, where it was held that since at common law ship repairers had no lien on the ship for their charges, they could not assert any claim against the ship in competition with a mortgagee of the ship ; but the note from the Registrar's books would seem to show that the decree in favour of the mortgagee was partly grounded on the fact that the ship repairer had signed receipts for his charges in order to enable the mortgage to be effected.

[7] A Treatise of Equity 52.

court to charitable trusts,[1] he tells us that the King as *parens patriae* was bound specially to care for them, and that he had delegated the care of them to the court of Chancery ; [2] and he gives a similar historical explanation of the modern extent of the court's jurisdiction over infants, idiots and lunatics.[3] He puts the principles which underlay the protection given by equity to the mortgagor on a very broad ground when he says : [4]

> Equity is Part of the Law of *England*, so that it cannot in any Manner of Way be provided by Agreement, in Case of a Mortgage, that the Court of Chancery should not give Relief. For such an Agreement would be contrary to natural Justice in the Creation of it, and prove a general Mischief ; because every Lender would by this Method make himself Chancellor in his own Case, and prevent the Judgment of this Court. Neither shall a man have Interest for his Money, and a collateral Advantage besides for the Loan of it, or clog the Redemption with any By-agreement, since this would be to let in all Manner of Extortion and Usury.

Ballow thus keeps very close to the original and the historic principle upon which equity originally rested, and tries to show that the doctrines of equity which the Chancellors were developing were legitimate deductions from this principle. In fact, just as the author of *The Doctor and Student* helped to carry over the principles of equity applied by the ecclesiastical Chancellors of the Middle Ages, who were canon lawyers, into the following period, when those principles were applied by Chancellors who were laymen and English lawyers ; [5] so Ballow's treatise helped to carry over the same principles into the period when equity was rapidly becoming a definite system of fixed principles and rules. But, as we shall now see, the necessity of setting some limitations upon the generality of these principles became more

[1] A Treatise of Equity 80-82.

[2] " So anciently in this Realm, there were several Things that belonged to the King as *Pater Patriae*, and fell under the Care and Discretion of this Court ; as Charities, Infants, Ideots, Lunaticks, etc. Afterwards such of them as were of Profit and Advantage to the King, were remov'd to the Court of Wards, but by the Statute, upon the Dissolution of that Court, came back again to the Chancery," ibid 80 ; in the case of infants modern cases have accepted this explanation of the historical origin of the Chancellor's jurisdiction, though its correctness is improbable, see vol. vi 648 ; and cp. Hargrave's note to Co. Litt. 128 cited Fonblanque, Treatise (5th ed.) ii. 225-228 ; Fonblanque, ibid 228-233, supports the generally accepted view stated by Ballow ; but it is clear that Ballow is wrong in failing to distinguish the jurisdiction over infants from the jurisdiction over lunatics, since the latter jurisdiction is not part of the general jurisdiction of the court of Chancery, but depends upon a special delegation to the Chancellor, vol. i 475 ; but both in the case of infants and of charities, below 270-271, the jurisdiction of the court may, as Spence says, Equitable Jurisdiction i 592, be regarded as " compounded of the general jurisdiction of the Court of Chancery over trusts, and the prerogative jurisdiction committed to the Chancellor by the sovereign as *parens patriae*, he having in that character a general superintending power over public interests when no other person is intrusted with that power."

[3] Last note. [4] A Treatise of Equity 87. [5] Vol. v 268.

apparent, as the doctrines of equity became more systematic and more fixed.

(2) *Ballow admits that there are limitations upon the application of these principles, and consequently upon the power of equity to interfere with the law, and that the established rules of equity ought to be followed.*

We have seen that, from the first, it had been admitted that there were limitations on the power of equity to interfere with the law. In the first place, the author of *The Doctor and Student* admitted that, though, as a general rule, equity should intervene if a strict application of the law leads to harsh or unfair dealing, the intervention of equity might, by the terms of the law, be expressly or by implication forbidden.[1] This limitation was expressly admitted by Ballow. "If the Law has determined a Matter with all its Circumstances, Equity cannot intermeddle; and for the Chancery to relieve against the express Provision of an Act of Parliament, would be the same as to repeal it."[2] In the second place, we have seen that, from the latter part of the sixteenth century onwards, the discretion of the Chancellor to make what decrees he pleased, in order to adjust on ideally equitable principles the rights of the parties, was coming to be limited by the established practice of the court which was recorded in its decisions;[3] and that the growth of the practice of reporting decisions was giving rise to certain principles and rules which limited still further the Chancellor's discretion.[4] We have seen that Lord Nottingham had laid it down in 1672 that the conscience which should direct the Chancellor was not "*naturalis et interna*," but "*civilis et politica* and tied to certain measures;"[5] and that in 1734 Jekyll, M.R., had emphasized the principle that the Chancellor's discretion must be exercised in accordance with established principles.[6] This limitation of the Chancellor's discretion was recognized by Ballow when he said that

> altho' in Matters of apparent Equity, as Fraud, or Breach of Trust, Precedents are not necessary; yet in other Cases, it is dangerous to extend the Authority of this Court further than the Practices of former Times.[7]

In fact, the process which has ended in making equity a systematic body of principles and rules, which are almost as fixed as the principles and rules of the common law, had been rapidly proceeding since the latter part of the seventeenth

[1] Vol. iv 281.
[2] A Treatise of Equity 3.
[3] Vol. v 275-276.
[4] Ibid 276-278; vol vi 616-619, 668-669.
[5] Cook v. Fountain (1672) 3 Swanst. at p. 600, cited vol. vi 547.
[6] Cowper v. Cowper (1734) 2 P. Wms. 753-754, cited vol. vi 669.
[7] A Treatise of Equity 3; cp. Heard v. Stanford (1736) Cases t. Talbot at p. 174, cited above 217 n. 2.

century. It is true that the application of the principles and rules of equity has never become quite so fixed as the application of the principles and rules of the common law. Equitable remedies always have been and still are discretionary.[1] But it is clear that, as the ground comes to be more thickly covered with precedents, the range of this discretion will become more and more circumscribed. As yet, however, the process is in its initial stages. We shall now see that, when Ballow was writing, the Chancellors had a wider discretion than they had at the end of the century.

(3) *Because the development of a regular and a fixed system of equitable principles and rules was in its initial stage, the rules laid down in some of the cases were then more closely connected with the original wide principle on which equitable interference with the law was based, than they were later, with the result that some very loose doctrines were sometimes laid down which were later rejected.*

We have seen that Lord Nottingham, though he insisted that the conscience which ought to guide the Chancellor was "*civilis et politica* and tied to certain measures," sometimes made use of the original wide principle upon which equitable interference with the law was based. Thus, in order to justify his dissent from the judges in the *Duke of Norfolk's Case*, he said, "I must be saved by my own faith, and must not decree against my own conscience and reason."[2] In 1711 Harcourt, L.C., justified his dissent from a decision of his predecessor Cowper in the same way;[3] and in 1735 Talbot made use of the same argument to explain his dissent from an earlier decision.[4] In 1755, in a case in which it was alleged that the execution of a power had been procured by misrepresentation, Lord Hardwicke said: "This court is a court of conscience. I shall give my opinion in this case according to my conscience."[5] As I have already pointed out, the fact that many of the cases which came before the court of Chancery depended on complicated

[1] This contrast between the application of legal and equitable remedies was explained and acted upon by Lindley L.J. in *in re* Scott and Alvarez's Contract [1895] 2 Ch. at pp. 612-614; cp. Ballow's statement, op. cit. 36, that "altho' a written Agreement being unreasonable, the Court will not carry it into Execution; yet they will decree, that it be deliver'd to the Person for whose Benefit it was design'd, that he may have an Opportunity to make the most of it at a Trial at Law."

[2] The Duke of Norfolk's Case (1681) 3 Ch. Cases at p. 47, cited vol. vi 546.

[3] "Lord Keeper Harcourt said, that he had a great respect for his predecessor, but that he must determine causes according to his own conscience, and could not agree with Lord Cowper's decree," Bale v. Coleman 2 Eq. Cases Ab. at p. 311.

[4] "As to the case of *Pratt* and *Pratt*, his Lordship declared he had a great regard and deference to the opinion and the judgment thereupon given, but that however he must be guided by his own judgment and conscience," Lutwich v. Lutwich, ibid at p. 448.

[5] Scroggs v. Scroggs, Ambler at p. 814; for Hardwicke's view as to the place of conscience in the administration of equity see below 261-263.

states of fact, and on the peculiar circumstances of the parties, and the fact that many of the doctrines of equity were still somewhat nebulous, made it possible for the Chancellors to make the decrees which commended themselves to their sense of what was fair and just.[1] It is not surprising, therefore, that in this, as in earlier periods in the history of equity, doctrines are laid down in the cases and in Ballow's book, which were based upon a particular Chancellor's view of what was equitable in the circumstances of the particular case; and that these doctrines, because they were contrary to the principles and rules of equity which ultimately became established, were later rejected.[2] The following instances of these loose doctrines appear in Ballow's book:

Ballow tells us that,

> in all contracts purely chargeable, if there appears to be an inequality, altho' there was no Deceit on either Side, and all the Faults of the Things were exposed: Yet if the Damage be considerable, the Bargain ought to be made void.[3]

There was little if any warrant for this doctrine in the decided cases.[4] In 1741 it was expressly rejected by Lord Hardwicke[5] and in 1787 by Eyre, C.B.[6] Again, Ballow tells us that,

> an Executor or Trustee not being bound to lend etc., if he do lend it is at his Peril; and if it be by that Means lost, he shall answer the same out of his own Estate, and therefore as he shall bear the Loss, he shall have the Gain.[7]

This is quite contrary to principle,[8] and, in fact, even before Ballow wrote, it had been decided not to be law.[9] Similarly,

[1] Vol. vi 669-670.

[2] For instances of such cases at an earlier period see vol. v 337 n. 4.

[3] A Treatise of Equity 11.

[4] Fonblanque, A Treatise of Equity (5th ed.) i 127 says, "I have not been able to find a single case in which it has been held, that mere inadequacy of price is a ground for the court to annul an agreement, though executory, if the same appear to have been fairly entered into, and understood by the parties, and capable of being specifically performed; still less does it appear to have been considered as a ground for rescinding an agreement actually executed"; the case which comes nearest to it is Herne v. Meeres (1679) cited in note 2 to the case of Heathcote v. Paignon (1787) 2 Bro. C.C. 179; but in both these cases there was evidence of fraud or oppression; for two cases in 1721 in which the fact that an excessive price was promised was made the ground of relief, see below 232-233.

[5] Willis v. Jernegan 2 Atk. at p. 251.

[6] Griffith v. Spratley cited in note 4 to the case of Heathcote v. Paignon (1787) 2 Bro. C.C. 179.

[7] Op. cit. 75; his authority was Bromfield v. Wytherley (1718) Prec. in Ch. 505, where the distinction he makes between a solvent and insolvent trustee was drawn.

[8] See Fonblanque, op. cit. ii 186; as he points out the principle stated by Ballow was considered and condemned by Lord Thurlow in the case of Newton v. Bennet (1784), 1 Bro. C.C. 359.

[9] Ratcliffe v. Graves (1683) 1 Vern. at p. 197, *per* North L.K.; in 1706 Cowper L.K. ruled that, "although a trustee or executor is not empowered or directed to place out at interest; yet when he makes interest he shall be accountable for it," Lee v. Lee 2 Vern. 548.

following two early cases,[1] he lays it down that a factor (whom he admits to be a trustee) may retain a profit made by non-payment of customs in a foreign country, which is quite contary to the principles elsewhere laid down by himself,[2] and to the principle laid down in 1726 in the case of *Keech v. Sandford*,[3] as to the duty of a trustee to account for any profit made as a result of the trust relationship. Ballow tells us that

> in the Performance of a Trust, the Chancery has a Power to alter the Disposition of the Party upon emergent Accidents, which he did not foresee; and which if he had foreseen, he would in all Probability have settled his Estate otherwise.[4]

Here again there was authority in the earlier cases for this proposition;[5] but at the end of the century Fonblanque said that it gave "a latitude of construction much beyond what our courts of equity would probably now consider themselves entitled to take."[6] Ballow states that, though a will proved in the ecclesiastical court cannot be impeached for fraud in the court of Chancery, yet there may be a fraud in obtaining a will which is relievable there.[7] This was a subject upon which the decisions had been very conflicting.[8] But later cases have settled that there was no such equity, because, as Fonblanque says, "a will of personal estate may be set aside in the ecclesiastical court, and a will of real estate may be set aside at law."[9]

The decided cases show that it was inevitable that the writer of a text-book on equity at this period should lay down some very vague rules on many matters, and that he should state as grounds for equitable interference principles which were later rejected; for on many matters the cases were in conflict. Though some of the cases lay down principles and rules which have been accepted, others are quite inconsistent with these principles and rules; and others can only be supported by reasons which were not those given by the court which decided them. These facts were recognized by Talbot when he said, "I think it much better to stick to the known general rules, than to follow any

[1] Smith v. Oxenden (1663) 1 Ch. Cases 25; Knipe v. Jesson (1666) ibid 76; these cases were probably decided mainly on the ground that this retention was permitted by mercantile custom.

[2] "He that takes upon him a Trust, takes it for the Benefit of the Person for whom he is trusted, and not to take any Advantage to himself," op. cit. 76.

[3] Cases t. King 61.

[4] Op. cit. 77.

[5] Nourse v. Yarworth (1674) Rep. t. Finch at p. 159; cp. Hyde v. Seymour (1698) 2 Free, at p. 43.

[6] Op. cit. ii 97; but the modern cases have recognized a limited power of this kind, see *in re* New [1901] 2 Ch. 534; and this power is now given by the Trustee Act 1925 § 57.

[7] Op. cit. 99.

[8] Fonblanque, op. cit. i 69-70.

[9] Ibid 70; Bennet v. Wade (1742) 2 Atk. 324; Webb v. Claverden (1742) ibid 424; Allen v. McPherson (1847) 1 H.L.C. at p. 210, *per* Lord Lyndhurst.

one particular precedent which may be founded on reasons unknown to us: such a proceeding would confound all property."[1] In fact some of the early decisions of the court of Chancery are like some of the dicta to be found in the Year Books. They contain the germs of some of the principles and rules which have become fundamental principles and rules of modern equity; but they contain also principles and rules which have been rejected by later lawyers.[2] Let us look at one or two instances.

It seems to have been held that, if a parol agreement were made to make a settlement in consideration of marriage, and a marriage took place on the faith of that agreement, the marriage was a sufficient part performance to take the case out of the statute of Frauds, either because it was, in the circumstances, fraudulent to plead the statute, or because the parties had changed their position on the faith of the contract.[3] This decision was overruled by Hardwicke in 1749. He held that marriage alone could not be a part performance, since this would be tantamount to a repeal of the statute.[4] At the beginning of the eighteenth century the idea that, if a woman before her marriage settled her property on herself without the knowledge of her husband, the settlement was not binding because it was a fraud on his marital rights,[5] still persisted;[6] and in 1710 Cowper thought that if property was given to a married woman for her separate use, and no trustee was appointed, the husband's common law rights were not barred[7]—a view which was negatived in 1725, when it was held that the court would supply the want of a trustee by making the husband a trustee for his wife.[8]

Sometimes decisions were founded on principles of public policy, and even on peculiar conditions arising out of the circumstances of the times.

Many cases show a leaning in favour of the heir, because it was thought expedient that landed estates should be preserved intact and descend as a whole to the eldest son; and, so far as possible, free from incumbrances. It was said in 1724 to be

[1] Clare v. Clare (1734) Cases t. Talbot at p. 26.
[2] Vol. ii 555-556; vol. v 490.
[3] Seaford v. Meale and Leonard (1721) Prec. in Ch. at p. 561.
[4] Taylor v. Beach (1749) 1 Ves. Sen. 297: cp. McManus v. Cooke (1887) 35 C.D. at p. 391 where this case is cited and approved.
[5] Vol. v 311-314; vol. vi 644-645; Draper's Case (1677) 2 Free. 29.
[6] Gilbert, Lex Praetoria 280, 344-345; Cotton v. King (1726) 2 P. Wms. at p. 360, and see ibid 674, where the settlement was upheld because it was reasonable; but it was held in 1788 that a settlement by a woman of her own property before marriage would only be upset if she had been guilty of active fraud, Strathmore v. Bowes 2 Bro. C.C. 345; below 275, 324.
[7] Harvey v. Harvey 1 P. Wms. 125. [8] Bennet v. Davis 2 P. Wms. 316.

a standing rule in this court, that when a portion or legacy is to be paid out of an estate and lands, at such a time, or at such an age, then, in favour of the heir at law, if the legatee die before the day, the legacy or portion is sunk and gone; but it is otherwise if the legacy is to be paid out of personal estate.[1]

It was a rule both of equity and the common law that an heir could only be disinherited by express words;[2] and in 1729 a construction was put upon marriage articles, which was based partly on the argument that "sons are of a different consideration in equity from daughters, they being to support the name of the family, which daughters do not," and that, "in the general course of marriage settlements daughters are provided for by pecuniary portions and not by land."[3] In 1723 Macclesfield considered it to be a very hard case—almost a want of respect to the Crown—for a peer to disinherit his heir.[4] There was thus authority for Ballow's statement, that the court might refuse to order trustees to make a conveyance "for a political reason, as if it were to enable a nobleman to suffer a recovery and leave the honor bare without estate, or if the party were a notorious spendthrift."[5]

Even more general grounds of public policy sometimes influenced the Chancellor. Thus two decisions were arrived at in 1721 which were based mainly on the peculiar financial conditions prevailing at the time of the bursting of the South Sea Bubble.[6] In both cases specific performance was refused mainly on this ground;[7] and in one of them Macclesfield said:[8]

[1] Bateman v. Roach 9 Mod. at p. 106; but Hardwicke denied that equity favoured the heir, and accounted for the rule that legacies charged on land at a future date were not raised if the legatee died before the day of payment, by saying that in such a case equity followed the rule of the common law, but that in cases of personal property it followed the rule of the civil law, Prowse v. Abingdon (1738) 1 Atk. at p. 486.

[2] Shaw v. Bull (1702) 12 Mod. at p. 594, *per* Powell J.; Denn d. Gaskin v. Gaskin (1777) 2 Cowper at p. 661, *per* Lord Mansfield C.J.; cp. 2 Eq. Cases Ab. 321.

[3] Powell v. Price 2 P. Wms. at p. 539.

[4] "But is it not a stronger case, when the King has bestowed an honour on a family, whereby the heir of the honour is *consiliarius natus*, and sits as a judge in the highest court, the house of Lords? Surely it is incumbent on the ancestor to leave some provision for the maintenance of the honour, and looks like want of gratitude to the Crown . . . to leave it naked. . . . Therefore more ought to be done in this case for the plaintiff than in a common case," Earl of Suffolk v. Howard (1723) 2 P. Wms. at p. 178; and this reasoning was approved by Hardwicke in the case of Leman v. Alie (1753) Ambler at p. 163.

[5] Op. cit. 76; Saunders v. Nevil (1701) 1 Eq. Cases Ab. 392-393.

[6] Lewis v. Lord Lechmere 10 Mod. 503; Savile v. Savile 1 P. Wms. 745.

[7] In Lewis v. Lord Lechmere the ostensible ground of the decision was that the plaintiff had not given the evidence of his title to Lord Lechmere's counsel within the time limited by the articles; but he put his insistence on exact time mainly on the fact that the price of South Sea stock, from whence the money for the purchase was to be raised, was varying from day to day.

[8] Savile v. Savile 1 P. Wms. at pp. 746-747.

that according to his apprehension a court of equity ought to take notice under what a general delusion the nation was at the time when this contract was made by Mr. Frederick, when there was thought to be more money in the nation than there really was, which induced people to put imaginary values on estates.

Mr. Frederick was, on this ground, allowed to get out of his contract by forfeiting his deposit—a decision which was quite contrary to established principles.

Only sixty-four years had elapsed between Nottingham's accession to office and the publication of Ballow's book. It is not surprising that decisions should sometimes be conflicting and doctrines either nebulous or unsettled. Rather it is surprising that, within this short period, so many of the principles and rules of equity should have emerged, sometimes in a loose and general, and sometimes in their final, form.

(4) *Though in very many cases the settled principles and rules of equity are apparent, some of these principles and rules are more flexible than they became later in the century, because they are more closely connected with the bases upon which they originally rested.*

I shall deal with the history of the development of the principles and rules of equity in the Second Part of this Book. We shall see that in the year 1737 considerable progress had been made in the development of the leading principles of equity, and in the formation of bodies of equitable doctrine upon such subjects as Trusts, Mortgages, Administration of Assets, Specific Performance of Contracts and other Equitable Remedies, and Evidence. But this process was then still in its initial stages. There were cases in which the bases upon which equitable interferences with the law rested, had been so interpreted that they had given rise to conflicting rules and principles, with the result that some of the principles and rules of equity were more uncertain, and therefore more flexible, than they afterwards became.

Throughout the greater part of the eighteenth century the idea that equity existed to do justice in those cases in which the rules of law would otherwise, by reason of their generality, do injustice, was present to the minds of the Chancellors.[1] At the beginning of the seventeenth century even Coke had admitted that, in cases of this kind, the court of Chancery exercised a useful and a necessary jurisdiction. He said :[2]

In this court of equity the ancient rule is good. Three things are to be judged in court of conscience : covin, accident, and breach of confidence. All covins frauds and deceits, for the which is no remedy by the ordinary course of law. Accident, as when a servant, an obligor, mortgageor etc. is sent to pay the money on the day, and he is robbed etc. remedy is to be had in this court against the forfeiture, and so in

[1] Above 223.

[2] Fourth Instit. 84.

the like. The third is breach of trust and confidence, whereof you have plentiful authorities in our books.

The principle that the court of Chancery had jurisdiction in cases of fraud trust and accident was repeated by Cowper in 1710,[1] with the explanation that equity could not interfere with the settled principles of the law to remedy general inconveniences, "but only when the observation of a rule is attended with some unusual and particular circumstance which creates a personal and particular inconvenience."[2] As late as 1767 the basic principles upon which the court acted, regarded from the point of view, not of the wrong suffered by the plaintiff, but of the conditions which he must satisfy in order to get relief, were emphasized by Lord Camden. "Nothing," he said,[3] "can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting the court is passive, and does nothing." It became less possible and less necessary to make these general statements of first principles as the doctrines of equity became more fixed and more technical. But all through this period and later there was a class of cases in which the court acted very much on its original principles, that is to say it looked very carefully into the facts and the circumstances of the parties, and tried to make the decree which was equitable having regard to those facts and circumstances. This was the class of cases in which some kind of fraud or sharp practice or unconscionable dealing was involved. We have seen that Ballow had said that in matters of apparent equity, such as fraud or breach of trust, precedents were not necessary;[4] and that in a case where misrepresentation was alleged Hardwicke had said that in cases of this kind he must judge according to his conscience.[5] It is for this reason that we find that in these cases the Chancellors did in fact judge according to their consciences, after a careful examination into all the facts and circumstances of the case before them. Let us glance at one or two instances of the exercise of this wide and flexible jurisdiction.

At the end of the seventeenth century equity had laid it down that it would not permit a statute to be made an instrument of fraud—

[1] Earl of Bath v. Sherwin (1710) 10 Mod. 1.

[2] Ibid; in this case the Chancellor refused to grant an injunction against the bringing of an action of ejectment after five unsuccessful actions had been brought "for it is a known maxim of the common law, that a man may try his title as often as he pleases in an ejectment"; but this decision was reversed by the House of Lords, and this reversal helped materially to make the action of ejectment an efficient substitute for the real actions, vol. vii 17.

[3] Smith v. Clay (1767) 3 Bro. C.C. 640 *note*.

[4] Above 227.

[5] Above 228.

so if the Son prevails upon the Mother, to get the Father to make a new Will, and make him Executor in her Stead, promising himself to be a Trustee for the Mother; this will be deemed a Trust for the Wife, on the Point of Fraud, notwithstanding the Statute of Frauds and Perjuries.[1]

The court was always ready to give a remedy for fraud or sharp practice where the parties had no remedy at law. Thus,

A. agreed for the purchase of timber, and A. and B. both enter into a bond that A. his executors and administrators, should not cut down under such a size. It comes out that A.'s name was only made use of for B. in the agreement. B. cuts down timber under size. There can be no remedy at law against B. upon that bond. But it is a fraud on the seller, and relievable in equity.[2]

Similarly, the court interfered to prevent acts which it considered unfair or unconscientious, or to give redress for such acts if they had been committed. Thus it interfered to prevent equitable waste or to give redress if it had been committed, because such waste was an unconscientious use of the legal rights possessed by a tenant for life without impeachment of waste.[3] Though at law an infant was not liable to repay money lent to pay for necessaries, in equity, if the money were spent on necessaries, the lender was subrogated to the rights of the person who supplied the necessaries, and could thus enforce payment;[4] and Cowper laid it down in another case that "if an infant is old and cunning enough to contrive and carry out a fraud," he ought in equity to make satisfaction for it.[5] If an agreement had been procured by undue influence not amounting to duress, the court would set it aside; and it was prepared in some cases to presume the existence of such influence from the relationship of the parties.[6] On the same principle it would set aside "catching bargains" with heirs and reversioners.[7]

[1] Ballow, op. cit. 57; the case to which he is referring is Thynn v. Thynn (1684) 1 Vern, 296; see also Devenish v. Baines (1689) Prec. in Ch. 3; and for other similar cases of this period see Fonblanque, op. cit. ii 37; Gilbert, Lex Praetoria 336.

[2] Butler v. Pendergrass (1720) 2 Eq. Cas. Ab. 481-482—a case decided by the Irish court of Chancery and affirmed by the House of Lords, 4 Bro. P.C. 174.

[3] Vane v. Lord Barnard (1716) 2 Vern. 738; "The Court upon filing the bill (and plea and answer put in by Lord Barnard), granted an injunction to stay committing of waste, in pulling down the castle; and now upon the hearing of the cause, decreed, not only the injunction to continue, but that the castle should be repaired, and put in the same condition as it was in, in August 1714; and for that purpose a commission was to issue to ascertain what ought to be repaired, and a master to see it done at the expense and charge of the defendant," ibid at pp. 738-739.

[4] Marlow v. Pitfield (1719) 1 P. Wms. 559.

[5] Watts v. Creswell (1714) 2 Eq. Cas. Ab. 515.

[6] Manners v. Banning (1709) 2 Eq. Cas. Ab. 282.

[7] Berney v. Pitt (1686) 2 Vern. 14; Nott v. Johnson (1687) ibid 27; Gilbert, Lex Praetoria 291-292, draws a distinction between cases where the heir had a maintenance—there the court would relieve after the father's death "and reduce

And, just as it would give relief in all these cases where fraud and sharp practice were proved, so it refused to enforce a bargain which it considered to be unconscionable. Thus, when an action was brought to get payment for attending auctions in order to enhance the price of goods, the court not only dismissed the action, but refused, in taking the account, to allow this demand to be set off against fair and just demands.[1] It is obvious from these and many other similar cases that equity was not only extending the conception of fraud, but was giving relief in many cases which bordered on fraud. It was for this reason that, as Lord Haldane said, "in Chancery the term 'fraud' came to be used to describe what fell short of deceit, but imported breach of a duty to which equity had attached its sanction"; [2] and that the term "fraud," when used in this way, meant "not moral fraud, but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience." [3]

This wide and flexible jurisdiction was being used by the court all through this period to enforce high standards of fairness; and as yet the court was very free to use it to strike at courses of conduct of which it disapproved, or to adjust the equities arising out of the often complicated states of fact which were brought before it. But it was inevitable that the exercise of this wide and flexible jurisdiction should give rise to definite bodies of equitable doctrine upon certain types of these cases. As yet this process has not gone far; but some of the cases indicate some of the lines which it will pursue. Thus it is clear that the determination of the court not to allow even a statute to be made an instrument of fraud, will give rise to the equitable rules as to secret trusts; and that the interference of the court to prevent equitable waste will modify the position of the tenants for life without impeachment of waste.[4] The rules laid down by the court as to the remedies which it will give against fraudulent dealings by infants will add to the law a gloss, which will make this branch of the law complex and uncertain.[5] Its interference to prevent "catching bargains" with heirs and reversioners will make the rules on this point a very distinct branch of equity. Its interference to prevent undue influence

the bargain to the common value of the goods," and cases where he had no maintenance—there the "bargain shall stand, because it is not to supply the luxury and prodigality of the heir, but to keep him from starving, and since the seller would have lost his money in case the heir had died during the life of the father, he ought to have a proportional benefit for such hazard"; this distinction was lost sight of when the doctrine of equity as to these catching bargains became stereotyped.

[1] Walker v. Gascoigne (1726) 2 Eq. Cas. Ab. 483.

[2] Nocton v. Lord Ashburton [1914] A.C. at p. 953.

[3] Ibid at p. 954.

[4] Vol. vii 278.

[5] See Lord Sumner's judgment in Leslie v. Sheill [1914] 3 K.B. at pp. 613-618.

had already added a much-needed supplement to the common law rules as to duress; and in the distinction which it was drawing between cases where it would and where it would not presume this influence,[1] and between the different considerations which it would apply to deeds and wills alleged to have been obtained by this influence,[2] we can see some of the outlines of the modern law.

This summary of the development of equitable doctrine between 1700 and 1737, shows that the principles and rules of equity had reached a stage at which the condition precedent for their further progress was the accession of an able lawyer to the chancellorship, who should hold his office for a sufficiently long period to make his influence felt. Fortunately for the development of equity this condition was fulfilled. Talbot was succeeded by Hardwicke who, next to Mansfield, was the greatest lawyer of the eighteenth century; and he held his office for nearly twenty years. We shall now see that it is upon his decisions that many of the modern principles and rules of equity rest.

Lord Hardwicke and his Contribution to the Formation of the Modern System of Equity

Lord Hardwicke [3] was not only a great lawyer and a great Lord Chancellor, he was also a statesman who exercised much influence upon domestic affairs and upon the foreign policy of the State. But it is in the sphere of domestic affairs, as an exponent and administrator of the law, and as a legislator and a critic of proposed legislation, rather than in the sphere of foreign politics, that he shines as a statesman.[4] The experience

[1] Above 235.

[2] Gilbert, Lex Praetoria 295-296; James v. Greaves (1725) 2 P. Wms. 270; for this distinction, which is now grounded upon different and sounder reasons than those assigned in this case, see Parfitt v. Lawless (1872) 2 P. and D. at pp. 468-470.

[3] The most exhaustive and much the best life of Hardwicke is "The Life and Correspondence of Lord Hardwicke," by P. C. Yorke; Harris's Life is useful in so far that it contains summaries from his papers of some of the cases in which he was concerned as law officer, Chief Justice, and Lord Chancellor, and also some of his correspondence; but otherwise it is verbose and not very illuminating; Campbell's Life, Chancellors v 1-173, though it contains some interesting material for his life, is, unfortunately, disfigured by many mistakes and misrepresentations; the best short life is that of Foss, Judges viii 178-197; the D.N.B. life is short and quite inadequate.

[4] Lord Chesterfield was his political opponent, but there was something in his statement that "Lord Hardwicke valued himself more on being a great minister of state, which he certainly was not, than upon being a great magistrate, which he certainly was. All his notions were clear, but none of them were great. Good order and domestic details were his proper department: the great and shining parts of government, though not above his parts to conceive, were above his timidity to

which he had gained as a law officer of the Crown, as Chief Justice of the King's Bench, and as Lord Chancellor, coupled with his great industry, learning, and ability, made him the best of guides in all matters pertaining to public law, gave him the knowledge and technical skill needed to draft, propose, and carry such legislative reforms as the Marriage Act, and the legislation which brought civilization to the Highlands of Scotland, and enabled him to oppose with effect legislative proposals which were either unsound or (as in the case of the Quaker Tithes Bill [1] and the Habeas Corpus Amendment Bill) [2] were so imperfectly drafted as to be impracticable. It was these gifts and these qualities that led Lord Chesterfield to say of him that he was "perhaps the greatest magistrate that this country has ever had." [3] Of his abilities as a statesman and a legislator I have already said something; [4] and at this point I must say something more of them in order to elucidate fully the great legal abilities, which he showed as Chief Justice and more especially as Lord Chancellor. I shall, in the first place, give a brief account of his career. In the second place, I shall give some account of the intellectual qualities which made him a great Chief Justice of the King's Bench and a great Lord Chancellor. In the third place, I shall attempt to estimate the nature of his contribution to the modern system of equity.

(1) *Lord Hardwicke's career.*

Philip Yorke, the future Lord Hardwicke, was the eldest surviving child of Philip Yorke, an attorney who carried on a prosperous practice at Dover.[5] His mother was Elizabeth Gibbon, the daughter of Richard Gibbon of Dover, and a distant connection of the historian.[6] He was born December 1, 1690, at his father's house in Snargate Street, Dover,[7] and was educated at a large school kept by Samuel Morland at The Blind Beggars House at Bethnal Green.[8] It was a well-known and well-run school; and among Yorke's teachers was William Jones, the friend of Sir Isaac Newton, and the father of the

undertake," Characters of Eminent Personages (ed. 1777) 34-35, cited Campbell, Chancellors v 65; Waldegrave, Memoirs 84-85, praises him as a great Chancellor, but depreciates him as a statesman—though he is forced to admit that "even in that capacity he had been the chief support of the Duke of Newcastle's administration"; there is no warrant for Waldegrave's assertion, ibid 201, that he was avaricious, proud, and no gentleman; see below 248, 252-253, 254.

[1] Above 220. [2] Vol. ix 119-121; P. C. Yorke, op. cit. iii 6-19.

[3] Characters of Eminent Personages (ed. 1777) 33.

[4] Vol. x 80, 82, 84.

[5] P. C. Yorke, op. cit. 31, 35; there is no ground for Campbell's assertion that his father was in "very narrow circumstances," Chancellors v 2, nor of his assertion that, being a "gratis" clerk of Salkeld, Mrs. Salkeld employed him to run errands for her, ibid 4; cp. P. C. Yorke i 56-57.

[6] Ibid 31, 32. [7] Ibid 33. [8] Ibid 49.

famous Sir William Jones.[1] Yorke's abilities impressed his teachers, and in a Latin letter, which Morland wrote to him on his leaving school, he prophesied his future greatness.[2]

His abilities determined his choice of a career. When he was quite a young boy it was settled that he should not succeed to his father's business, but should go to the bar;[3] and, after some hesitation as to whether or not he should go to the university,[4] it was settled that he should learn the rudiments of law in an attorney's office. In 1706, at the age of sixteen, he went to the office of Charles Salkeld,[5] clerk of the papers in the court of King's Bench and the brother of serjeant Salkeld the reporter,[6] where, as we have seen, he met three fellow pupils all of whom attained judicial rank.[7] Yorke lived with Salkeld at his house in Brook Street near Holborn Bars, but he moved to chambers in Pump Court shortly before his call to the bar.[8] On November 29, 1708, he was admitted to the Middle Temple, and was called to the bar May 27, 1715.[9] During the seven years of his apprenticeship he worked so hard at the practice and the theory of the law,[10] that he was ready to practice as soon as he was called.

From the first he made rapid progress. That progress was due mainly to his industry and ability, and to some extent to the favour of Macclesfield, with whom he had become acquainted through Thomas Parker, his fellow student at Salkeld's office.[11] "Mr. Yorke," wrote the elder Bentham,[12] "by means of his own merit and the countenance he was known to have from the Court, made so rapid a progress in his profession that he had soon as much business as he could well go through with." In 1717 he wrote a pamphlet upon the King's power to pardon in cases of impeachment, which upheld the view, which has been rightly rejected, that the King had no such power;[13] in 1718 he was

[1] P. C. Yorke i 49; for Sir William Jones see vol. xi 220-221; below 393-394.
[2] For the letter see Harris i 14-22. [3] P. C. Yorke, op. cit. i 52.
[4] Ibid, citing a letter written by Yorke "apparently to Holt C.J.," discussing alternative plans of education.
[5] Ibid 53; apparently there had been previous negotiations with one Tregary Harris, op. cit. i 29-30.
[6] Vol. vi 563; Hardwicke supervised the publication of the first volume of these reports, Wallace, The Reporters 399.
[7] Above 86. [8] P. C. Yorke i 53-54, 107. [9] Ibid 62.
[10] Below 254-257. [11] P. C. Yorke i 62-63.
[12] Cooksey's Essays 55; Bentham also says that Lord Macclesfield, both as Chief Justice and as Chancellor, "took every occasion to distinguish Mr. Yorke as his particular favourite"—which once produced a scene in court when, Macclesfield having observed that "Mr. Yorke's arguments had not been answered," serjeant Pengelly threw up his brief, and said he would not plead in a court where "Mr. Yorke was not to be answered," P. C. Yorke i 63, citing Cooksey's Essays 72.
[13] P. C. Yorke i 66-67; it was written to controvert Nottingham's pamphlet on the same subject which upheld the opposite view; a copy corrected by Hardwicke is in Add. MSS. 36,089; the argument is that, as the proceedings are at the suit

made Recorder of Dover ; [1] and in 1719, through the influence of the duke of Newcastle, he became a member of Parliament for Lewes.[2] In the same year he married Margaret Lygon, the widow of William Lygon, niece both of Lord Somers and of the wife of Sir Joseph Jekyll, the Master of the Rolls.[3] It was a very happy marriage. Lady Hardwicke was a good mother and a good wife.

She relieved her husband of nearly all domestic anxieties and responsibilities, and jestingly laid claim, " as she had good right to do, to so much of the merit of Lord Hardwicke's being a good Chancellor, in that his thoughts and attention were never taken from the business of the Court by the private concerns of his family." [4]

Yorke made his first recorded speech in the House of Commons on March 4, 1720, on the question of the right of the British House of Lords to hear appeals from Ireland.[5] Although there are few reports of his speeches, it is clear that he was an effective speaker, for he gained the reputation, according to Lord Chesterfield, of being " an agreeable eloquent speaker, but not without some little tincture of the pleader." [6] That he soon made his mark in the House is proved by the fact that on March 23, 1720, at the age of twenty-nine, he was made solicitor-general.[7] He was knighted in the following June,[8] and, in the following year, became treasurer of the Middle Temple.[9] In 1724 the attorney-general, Sir Robert Raymond, became Chief Justice of the King's Bench. Yorke succeeded him as attorney-general, and became a bencher of Lincoln's Inn and treasurer in 1725.[10] We shall see that as a law officer of the Crown he

of the Commons and not at the suit of the King, the King can no more pardon in such a case than he can release an action of tort brought by a private person. This argument disregards the criminal character of an impeachment ; and, though the analogy of the criminal appeal is in point (vol. i 381), it disregards the fact that § 3 of the Act of Settlement was needed to abolish the King's power to stop an impeachment by the exercise of his power to pardon, vol. vi 232.

[1] P. C. Yorke i 66 ; he held this office, which he performed by deputy, till his death, when he was succeeded by his second son Charles Yorke.

[2] Ibid 67 ; in the Parliaments of 1720 and 1727 he sat for Seaford, Foss, Judges viii 187.

[3] P. C. Yorke i 68-71 ; the representations of Jekyll as to Yorke's abilities and prospects overcame the objections of the lady's father to a son-in-law who could not then make a sufficient settlement on the lady, Foss, Judges viii 184 ; for the settlement made see P. C. Yorke i 68.

[4] Ibid ii 565, citing Cooksey's Essays 33 ; and cp. ibid 39-40 ; she mounted on red velvet the twenty embroidered purses in which the Great Seal was carried, which the Chancellor had acquired during the twenty years time of his office, and used them to adorn the hangings of the state room at Wimpole, ibid 39.

[5] P. C. Yorke i 67-68 ; for this controversy see vol. i 371-372.

[6] Characters of Eminent Personages (ed. 1777) 34.

[7] P. C. Yorke i 72. [8] Ibid 73. [9] Ibid.

[10] Ibid 79 ; Black Books of Lincoln's Inn iii 269, 270 ; his chambers were at first no. 4 Garden Court, and later at no. 4 Serle Court (now New Square), P. C. Yorke i 107 ; he remained a bencher of the Middle Temple, ibid.

showed that he was a great criminal lawyer, and a great constitutional lawyer;[1] and that he was learned in ecclesiastical law, Roman law, and international law.[2] In his conduct of prosecutions, and more especially in his conduct of the prosecution of Layer for treason in 1722,[3] he gained the character attributed to him by Chesterfield[4] and endorsed by the House of Commons,[5] of holding the balance fairly between the Crown and the subject and of never pressing hardly on the criminals whom he prosecuted.[6] At the same time he and Talbot were the two leaders of the Chancery bar;[7] and, in the appeals which he argued from the Scotch courts, and from the colonial courts, he showed that he was learned in Scotch law and colonial law.[8] It is not surprising that there was much competition to secure his services;[9] and it is clear that his clients appreciated and were grateful for them.[10]

His parliamentary support of the government was equally efficient. In 1732 he supported the government proposal for the augmentation of the forces.[11] In 1733 he was one of the most effective advocates of Walpole's excise scheme;[12] and "it was probably on this occasion that a passing reference to his own conduct in Crown prosecutions, and to his scrupulous respect for the subject's legal rights and liberties, which he had made it a rule to practise, called forth a sudden burst of

[1] Below nn. 4, 6, 242, 243. [2] Below 256. [3] 16 S.T. 94.

[4] "He was by no means what is called a prerogative lawyer, he loved the constitution, and maintained the just prerogative of the crown, but without stretching it to the prejudice of the people. He was naturally humane, moderate and decent, and when by his former employment he was obliged to prosecute state criminals, he discharged that duty in a very different manner from most of his predecessors, who were too justly called blood-hounds of the crown," Characters of Eminent Personages (ed. 1777) 36, cited P. C. Yorke i 75.

[5] Below 242.

[6] At the close of his final speech to the jury in Layer's case he said: "I would not, even in this cause of your king and your country, say anything to excite your passions; I choose rather to appeal to your judgments; and to those I submit the strength and consequences of the evidence you have heard. . . . I have but one thing to add, and that is humbly to beg of your lordship, for the sake of the king, for the sake of myself, and for the sake of the prisoner at the bar, that if I, through mistake or inadvertency, have omitted or misrepresented anything, or laid a greater weight on any part of the evidence than it will properly bear, your lordship will be pleased to take notice of it, and set it right," 16 S.T. at p. 287.

[7] Above 214. [8] Below 256; cp. Campbell, Lives v 44.

[9] See P. C. Yorke i 109-112 for a controversy as to whether, having some thirteen years previously been once retained for a client, and then dropped, he could appear against him; on another occasion a would-be client wrote, "I look upon losing his assistance in my cause as so great a misfortune that I cannot forbear being to the last importunate upon so very material a point, which I really regard almost as the fate of my cause." ibid 112.

[10] In 1733 Bolingbroke wrote: "Give me leave . . . to congratulate your recovery from your late indisposition. I do it with all the gratitude of a client, and with all the affection, if you permit me to use the terms, of a friend," ibid 115.

[11] Parlt. Hist. viii 893.

[12] P. C. Yorke i 98-100; for this scheme see vol x 69-71.

applause from the House." [1] And as at the bar he was careful not to exaggerate the prerogatives of the Crown, so in Parliament he refused to support government measures of which he did not approve, and supported opposition measures which he considered to be just,[2] It is clear that he was as much respected by such leaders of the opposition as Shippen [3] and Bolingbroke [4] as by the leaders of his own party. Nor was he forgetful of the obligations to those who had assisted him in his younger days. He said all that was possible for Lord Macclesfield in the debates in the House of Commons, and the House did not insist on his taking part in Macclesfield's impeachment.[5] We have seen that it was his pamphlet on the judicial authority of the Master of the Rolls which established the view contended for by his uncle, Sir Joseph Jekyll, as against the view supported by Lord Chancellor King.[6]

I have already given some account of the negotiations which preceded his appointment to the office of Chief Justice of the King's Bench in 1733. We have seen that in that year Talbot became Lord Chancellor, and that Yorke became Chief Justice and a peer, with the title of baron Hardwicke.[7] The same qualities of capacity and industry which he had shown as student, barrister, and law officer were shown in an even higher degree as Chief Justice; for "the whole turn of his mind and intellect had always been pre-eminently judicial." [8] He was a great Chief Justice—in fact Lord Thurlow once said that he was a greater Chief Justice than a Chancellor.[9] This was an obvious exaggeration; but it illustrates the great impression which he made during the three years' tenure of that office. His famous judgment in the case of *Middleton v. Crofts*,[10] which raised the question of the jurisdiction of the ecclesiastical courts over laymen, shows that he was as learned in ecclesiastical law as in the common law; and that he was as well read in legal history as in the law of his own time. Being a learned and an historically-minded lawyer he would never consent to overturn settled rules of law; [11] and he stressed the need for uniformity in decisions.[12] But he always tried to decide his cases on a principle which was technically sound and socially and politically expedient.[13] And of social and political expediency he was well able to judge; for his work as Chief Justice and as judge of assize brought him into contact with some of the social problems of the day—the mania for gambling, the lawlessness of the

[1] P. C. Yorke i 100. [2] Ibid 98. [3] Ibid.
[4] Ibid 97; for other letters written to him by Bolingbroke see Harris, Life of Hardwicke ii 28-29, 53, 99-106, 111-114, 115-119, 120-124.
[5] P. C. Yorke i 88. [6] Above 213, 221 n. 5. [7] Above 214-215.
[8] P. C. Yorke i 119. [9] Ibid 121 n. 3. [10] (1736) 2 Atk. 650.
[11] Below 249, 261. [12] Below 261. [13] Below 261, 263-264.

country, the licentiousness of the press, the tyranny sometimes exercised by persons in authority. For all these evils he considered the best remedy to be a firm and impartial administration of the law; for, throughout his life, he considered that the English constitution was the best in the world, and English law the best "that human wisdom could frame." [1] We shall see that he inculcated this lesson in his speeches in Parliament, in his judgments, and in his charges to grand juries.[2]

He soon made his influence felt in the House of Lords. Just as when acting as law officer, he had given a discriminating support to government measures in the House of Commons,[3] so now he gave them a discriminating support in the House of Lords. He supported the government on a motion for the augmentation of the forces in 1734, and he supported the Charitable Uses Bill.[4] But we have seen that he successfully opposed the Quakers' Tithes Bill because he regarded its provisions as impracticable; [5] and he unsuccessfully opposed a Smuggling Bill because it interfered unduly with the liberty of the subject.[6] In the debate on the Porteous riot, and other riots which had taken place in England, he pointed out that they were due to "a want of power in the civil magistrate to prevent and punish, and a too great liberty in others to mislead the people, and to stir them up to riot and disorder"; [7] and he defended the legality of calling upon the troops for assistance in such cases.

> I hope it will be allowed, our soldiers are the King's subjects, as well as other men; and it is well known that most of our magistrates, especially those concerned in the execution of the law, have a power to call any of the King's subjects they can see to their assistance, for preserving the peace, or for enabling them to execute any of the King's writs; and in case of any such call, we likewise know, that everyone of the King's subjects, so called, is obliged to obey; if they do not, they are guilty of a misdemeanour, for which they may be indicted, and for which they may, by express statute, be fined and imprisoned: Why then may not a civil magistrate call the soldiers to his assistance as well as other men? [8]

It was inevitable that a lawyer and a statesman, who could thus make his weight felt in the House of Lords, should become an influential member of the government. "Already, in the autumn of 1736, the duke of Newcastle is writing to him to

[1] "'Tis the great advantage and happiness of us of this Nation to live under a Government the best constituted of any in the world—administered over us and secured to us by the best body of Laws that human wisdom can frame," cited P. C. Yorke i 144 from an address to a grand jury.

[2] Below 249, 250, 251. [3] Above 242. [4] P. C. Yorke i 148.

[5] Above 220. [6] P. C. Yorke i 151.

[7] Parlt. Hist. ix 1295. [8] Ibid 1297.

urge his attendance at a meeting of the ministers, and adding: 'Dear Hardwicke, without you we are nothing.'" [1]

Talbot died February 14, 1737: and on the same day Walpole sent for Hardwicke and offered him the Great Seal.[2] Hardwicke was unwilling to take it; [3] but it was obvious that he was the lawyer best fitted to hold it—"all men's eyes," says the elder Bentham,[4] "were immediately turned towards him as his [Talbot's] successor." After some negotiation as to terms,[5] he accepted it on February 21, 1737,[6] and began to sit as Chancellor in Lincoln's Inn Hall three days later.[7] His solemn installation in office took place in Westminster Hall on April 29. Bentham says: [8]

> To do the greater honour to his Lordship, Sir Robert Walpole, then Prime Minister, the then Lord President of the Council, and several others of the greatest officers of the state attended him into the court of Chancery, where he took his oath of office and his seat therein; and I well remember being present in Westminster Hall upon that day and seeing his Lordship afterwards going out of the Court of Chancery from sitting as Chancellor into the Court of King's Bench, where he sat as Lord Chief Justice of that Court, to give his opinion in a cause of some consequence which had been argued before him there; so that it may very truly be said that he presided on one and the same day in the two highest Courts of law and equity in Westminster Hall.

In fact he did not resign his office of Chief Justice until June 8, and, following, as he notes, the precedent set by Littleton, who was promoted from the office of Chief Justice of the Common Pleas to the office of Lord Keeper, he heard a motion as Chief Justice after he had become Lord Chancellor.[9]

Hardwicke held the post of Chancellor for nearly twenty years—till November 19, 1756—a length of tenure which had

[1] P. C. Yorke i 144.

[2] Ibid 158, citing Hardwicke's memorandum of these events.

[3] Hardwicke says that he told Walpole, "that I was now in a quiet situation which by practice was become easy to me; that I had no ambition to go higher, and . . . desir'd to be left where I was," ibid.

[4] Cooksey's Essays 61.

[5] The office of chief clerk of the King's Bench, which he could grant for two lives for the benefit of his family, was on the point of falling in, so that some equivalent was due; Hardwicke refused to take £1,000 a year from the office of Chief Justice and add it to the Chancellor's salary; the equivalent suggested was the reversion of the office of teller of the Exchequer for his eldest son, and this was agreed to, P. C. Yorke, op. cit. i 158-159.

[6] Foss, Judges viii 190.

[7] P. C. Yorke, op. cit. i 160.

[8] Cooksey's Essays 61-62.

[9] Lord Hardwicke says, "I continu'd Chief Justice of the King's Bench, and did all acts of office at my Chambers, till the 8th day of June following, when I acknowledged a surrender of that office before Mr. Justice Lee, who on the next day . . . was sworn Chief Justice at my house in Lincoln's Inn Fields. And note that during that time, viz. in Easter term, I sat one day in Court as Chief Justice in my black gown and hat without any wig and heard a motion, according to the precedent of my Lord Keeper Littleton mentioned in Cro. Car. 600; 1 Sid. 338, 365," cited P. C. Yorke, op. cit. i 161.

been exceeded by only two Chancellors, Nicholas Bacon and Ellesmere.[1] In 1754 he accepted an earldom—a well-deserved promotion which he had refused at an earlier date.[2] After this long tenure of office, he was not sorry to be relieved from the "Chancery plough" as he called it;[3] and at the end of the last of his judicial note-books he wrote the line:

Jam mihi parta quies, omnisque in limine portus.[4]

Though he refused again to become Chancellor,[5] he attained only a modified "quiet." After his resignation he remained a member of the cabinet, and prepared all the King's speeches;[6] and in 1761 he was offered and refused the Privy Seal.[7] He finally resigned with Newcastle in 1762.[8] For a short period after his resignation he was a detached member of the opposition and took some part in the debates in the House of Lords.[9] But at the end of 1763 his health began to decline, and he died March 6, 1764.[10]

During his long tenure of office Hardwicke was assisted by four Masters of the Rolls—John Verney (1738-1741), William Fortescue (1741-1749), John Strange (1750-1754), and Thomas Clarke (1754-1764). Of John Strange I have already spoken.[11] Verney[12] was born in 1699, and was called to the bar by the Middle Temple in 1721. He was a member for Downton in Wiltshire 1722-1734, and in 1727 he was made a judge of South Wales. At the beginning of George II's reign he took silk, in 1729 he was made attorney-general to the Queen, and in 1734 he was made Chief Justice of Chester. In 1738 he succeeded Jekyll as Master of the Rolls, and held that office till his death in 1741. The case of *Harding v. Glyn*,[13] a leading case on the subject of precatory trusts, is the best known of his decisions. William Fortescue[14] was a lineal descendant of the famous Chief Justice of Henry VI's reign.[15] He was born in 1687. On the death of his wife in 1710, he entered the Middle Temple.

[1] Foss, Judges viii 192.

[2] P. C. Yorke, op. cit. ii 77-78; there is a well-authenticated tale that when he came to court after his resignation George II did not recognize him, never having seen him in ordinary court dress, and did not realize that the Earl of Hardwicke was the man he had so long known as his Lord Chancellor, ibid 557.

[3] Ibid 211 citing a letter from Hardwicke to Pitt; in 1750 writing to Newcastle he says, "after having drudged in the laborious office of Chancellor near fourteen years, I have no fondness to keep it longer, especially at near three score. 'Tis a constant round of the same fatigue," ibid 96.

[4] Ibid 338.

[5] Ibid 370-371.

[6] Ibid 557-558; cp. ibid iii 294, 335, 336.

[7] Ibid 292.

[8] Ibid 302-303.

[9] Ibid 372-383; his last speech was in opposition to the bill imposing a tax on cider in 1763, Parlt. Hist. xv 1311-1312.

[10] P. C. Yorke, op. cit. iii 482-485.

[11] Above 130-132.

[12] Foss, Judges viii 176-177; D.N.B.

[13] (1739) 1 Atk. 469.

[14] Foss, Judges viii 123-124; D.N.B.

[15] Vol. ii 566-571.

He transferred to the Inner Temple in 1714, and was called to the bar by that Society in 1715. He acted as secretary to Walpole when he was Chancellor of the Exchequer in 1715, and was the friend of Gay and Pope. He was legal adviser to the Scriblerus Club, and helped Pope and Swift in the composition of the humorous report of *Stradling v. Stiles*. He became a baron of the Exchequer in 1736, and in 1738 a judge of the Common Pleas. From 1741 till his death in 1749 he held the office of Master of the Rolls. He was a sound, but by no means a brilliant lawyer. Thomas Clarke [1] was of lowly origin. His father was a carpenter in St. Giles Parish, Holborn, and his mother kept a pawnbroker's shop. It was through the influence of Zachary Pearce, the Dean of Westminster, that he was sent to Westminster School. From there he went to Trinity College, Cambridge, became a fellow in 1729, and was called to the bar by Gray's Inn in the same year. Pearce introduced Clarke to Macclesfield. He collated Macclesfield's copy of *Fleta* with Selden's edition, and in 1735 published anonymously an edition of *Fleta*. Macclesfield brought him to the notice of Philip Yorke. The favour of Yorke and his own abilities made his success in the court of Chancery certain. He soon acquired a large practice, and Hardwicke and Newcastle had no hesitation in recommending him for the post of Master of the Rolls in 1754. It is said that he was offered and refused the Lord Chancellorship in 1756. The most famous case which he helped to decide was the case of *Burgess v. Wheate* [2] in which, as we shall see,[3] he united with the Lord Keeper in holding (contrary to the opinion of Lord Mansfield) that, on failure of the heirs of a c.q. trust, the equitable estate did not escheat to the lord, so that the trustees were entitled to hold the estate beneficially.[4] This and other decisions show that he was a sound and learned lawyer. He held the office of Master of the Rolls till his death in 1764. All these Masters of the Rolls were competent lawyers; but all were overshadowed by the great position as a lawyer and a statesman which Hardwicke's abilities had deservedly given him.

When Francis Bacon was at the height of his fame Ben Jonson, on the occasion of his sixtieth birthday, celebrated:

> England's High Chancellor, the destined heir
> In his soft cradle, to his father's chair;
> Whose even thread the Fates spin round and full
> Out of their choicest and their finest wool.

[1] Foss, Judges viii 259-260; D.N.B.; the dates of his admission to Westminster and Trinity show, as the article in the D.N.B. points out, that he was not, as Foss says, the son of Sir Edward Clarke, Lord Mayor of London 1697, who was called to the bar by the Middle Temple in 1705; and "the evidence of his old school-fellow Bishop Newton is sufficient to disprove the notion that he was an illegitimate son of Lord Macclesfield." [2] (1759) 1 Eden 177. [3] Below 301-303.
[4] 1 Eden at pp. 185-214; vol. iii 71-72.

The last two lines were more true of Hardwicke than of Bacon. Hardwicke's handsome appearance and charm of manner [1] were combined with great industry,[2] a weighty and effective style of oratory,[3] and exceptional ability as a lawyer and a statesman; and to all these gifts there was added a luck which lasted nearly all his life. "What luck the Chancellor has," wrote Horace Walpole,[4]

> first, indeed, to be in himself so great a man; but then in accidents: he is made Chief Justice and peer, when Talbot is made Chancellor and peer. Talbot dies in a twelvemonth,[5] and leaves him the Seals at an age when others are scarce made Solicitors: then marries his son into one of the first families of Britain, obtains a patent for a Marquisate and eight thousand pounds a year [for his daughter-in-law] after the Duke of Kent's death: the Duke dies in a fortnight, and leaves them all! People talk of Fortune's wheel that is always rolling: troth my lord Hardwicke has over taken her wheel and rolled along with it.[6]

He was fortunate in his marriage [7] and in his family, and he was fortunate in that he lived to see the successes, but did not live to see the tragic end of his brilliant son, Charles Yorke;[8] but, above all, he was fortunate in occupying an exalted position in the State and in the legal profession, which enabled him to exercise to the best advantage all his great talents, as a minister of State, as a legal statesman, and as a lawyer.

As a minister of State he exercised a steadying, harmonizing influence, which was felt and valued by all the ministries of which he was a member. When he first became Chancellor he attempted without much success to mediate between the King and the Prince of Wales.[9] He mediated between Pelham and his brother the duke of Newcastle;[10] and the steady and life-long friendship between himself and the duke went far to mitigate some of the worst consequences of that statesman's eccentricities. But his most successful, and by far the most important of his mediations, was the mediation by which he brought about the famous alliance between Newcastle and the elder Pitt, which changed the course of European history.[11] Hardwicke

[1] P. C. Yorke, op. cit. ii 529.
[2] Below 254-256.
[3] P. C. Yorke, op. cit. ii 524; above 240; below 253.
[4] Walpole's Letters (Toynbee's ed.) i 78.
[5] This was a mistake, above 215-216.
[6] His eldest son had married the daughter of John Campbell, Lord Glenorchy, and granddaughter and heiress of Henry Grey, duke of Kent; the duke had been created Marquis Grey with a special remainder to his granddaughter a few days before the marriage, P. C. Yorke i 210; his eldest son had had a further piece of luck in that the reversion of the tellership of the Exchequer, for which his father had stipulated when he became Chancellor, above 244 n. 5, fell in in 1738, ibid.
[7] Above 240.
[8] Below 311-313.
[9] P. C. Yorke, op. cit. i 161-182.
[10] Ibid ii 41, 94-99, 105.
[11] Ibid ii 366, 368-370; Basil Williams, Life of Chatham i 322-323; to bring about this alliance Hardwicke allowed Pitt's friend Charles Pratt, the future Lord

had not, it is true, the genius of Pitt; but he gave Pitt's genius its chance when he helped to negotiate, and kept together [1] those two strange allies, neither of whom could in isolation have brought the war to a triumphant conclusion. That he was able to succeed so well as a mediator was due, in the first place, to his loyalty to his colleagues. His loyalty to Walpole was shown when he secured the rejection of the bill to indemnify any witnesses, who would give evidence against Walpole, against the consequences of crimes committed by themselves.[2] His loyalty to Newcastle was shown throughout his life, and, more especially, when he resigned the Chancellorship on Newcastle's retirement from office in 1756,[3] and when he finally retired with him in 1762.[4] In 1749 he wrote to Newcastle,

> I think it my duty not to profess an opinion to his Majesty, which I do not avow to his servants, who are consulted in secret affairs, more especially to your Grace, to whom my attachment has ever been most cordial, confidential, and without disguise.[5]

Hardwicke always acted upon this principle; and the fact that he did so is one of the main reasons for the great influence which he always had in any ministry in which he was a member. In the second place, his skill as a mediator was due to his keen insight into the realities of a situation. He roused the government to action when they were at first inclined to take too lightly the invasion of the Young Pretender in 1745.[6] He had not only the statesmanship to project, but the technical skill to carry out, the settlement of the Highlands.[7] He saw more clearly than anyone else, except perhaps Lord Mansfield,[8] that an alliance between Pitt and Newcastle was the only means by which a stable government and a successful prosecution of the war could be secured.[9]

As a legal statesman he takes a very high place. His experience as Chief Justice, as judge of assize, and as Lord Chancellor, gave him a keen insight into some of the most crying evils of his time. He was troubled by the lawlessness of the country. For that reason he always resisted attempts to

Camden, to be appointed attorney-general over the head of his son Charles Yorke, who was then solicitor-general, and Pratt's senior at the bar, P. C. Yorke, op. cit. ii 371-372; for Lord Mansfield's share in making this famous coalition possible see below 473.

[1] P. C. Yorke, op. cit. ii 557-558; cp. ibid iii 28, and Hardwicke's letter to Newcastle at pp. 38-40.

[2] He said: "This Bill makes persons witnesses who could not be witnesses. It indemnifies all the rogues in the three kingdoms, if they will come in for this purpose. . . . My Lords, so clearly do I see the dangers and injustice of a law like this, that I would more willingly suffer by such a Bill in my own case, than consent to pass it in that of another," cited P. C. Yorke i 290-291.

[3] Ibid ii 280. [4] Ibid iii 302-303. [5] Ibid ii 16-17.
[6] Ibid i 416-417. [7] Vol. x 80-81. [8] Below 473.
[9] Vol. x 84.

reduce the size of the standing army,[1] and, as we have seen, supported the measures taken by the government to suppress riots by force and to punish the rioters.[2] His Marriage Act put an end to the scandal of the Fleet marriages.[3] He was much concerned by the unrest caused by treasonable and seditious libels; and, at the end of his life, he maintained, contrary to Lord Camden's opinion,[4] but in accordance with the opinion of the House of Commons, the now recognized rule, that privilege of Parliament does not extend to the writing and publishing of a seditious libel.[5] He favoured well-considered changes in the law, such as the reform of the calendar [6] and the Act for the naturalization of the Jews.[7] But he considered that changes in the law, which were not vital to the safety and happiness of the nation, ought not to be carried out in the face of a hostile public opinion; and, for that reason, he acquiesced in the repeal of the last-named Act.[8] On the other hand, he opposed bills which he considered to be ill-drawn, and likely to produce more evil than good. His opposition to the Quakers' Tithes Bill,[9] to Pitt's first Militia Bill,[10] and to the Habeas Corpus Bill,[11] was based on this ground; and nothing angered him more than Pitt's attempt to "set himself up as a peremptory judge of constitutional law." [12] Lytton Strachey has said of the eighteenth century that,

[1] Above 243.

[2] Above 243; he supported the sternest measures to punish the Porteous rioters, but the opposition of the Scotch and the Tories caused a very much milder Act to be passed, P. C. Yorke, op. cit. i 183-184.

[3] Vol. xi 609-610. [4] Wilkes's Case (1763) 19 S.T. at p. 989.

[5] P. C. Yorke, op. cit. iii 467, 489, from which it appears that he approved of the opinion of his son the solicitor-general to this effect; Anson, Parliament (2nd ed.) 143.

[6] P. C. Yorke, op. cit. ii 54.

[7] Ibid 54-56; cp. his letter to Secker, the bishop of Oxford, on this topic, ibid 127-130.

[8] "If the safety and happiness of the nation depended evidently upon this law being continued and carried into execution, I should be against the repeal, not because I should be for cramming even the most wholesome physic down the throats of my countrymen, but because I have an opinion of their good sense, and from thence should expect, that they would, in a little time, discover the utility of the law"; but this was not a law of such importance; and in such cases. "however much the people may be misled, yet, in a free country, I do not think an unpopular measure ought to be obstinately persisted in," Parlt. Hist. xv 100, 102.

[9] Above 220. [10] P. C. Yorke, op. cit. ii 262-265.

[11] Above 238.

[12] In 1763 he wrote of Pitt, "my apprehension is that he will set himself up as a peremptory judge of constitutional law, as he did in the case of the Habeas Corpus Bill in 1758, when he laid it down as a maxim that the Lawyers are not to be regarded in questions of liberty. For my own part I did not give way to him then, nor will I do so now. . . . In political points I can show a deference for his opinion; but I will never act so mean a part as to give up all my knowledge and experience in the law, and all the principles about the legal prerogative of the Crown and public order and good government, which I have been endeavouring to support all my life in complaisance to any man," P. C. Yorke, op. cit. iii 501.

in art, in thought, in the whole conduct of life, what it aimed at was the just, the truly proportioned, the approved and absolute best. Its ideals were stationary because they were so high; and the strict conformity which they enjoined was merely the expression of a hatred and scorn of everything short of perfection. Whether such ideals were ever realized, whether their realization was even possible, may indeed be doubted: what cannot be doubted is that they formed the framework of the eighteenth-century mind.[1]

Hardwicke, and later Blackstone,[2] were the perfect embodiment of this aspect of the eighteenth-century mind.

Hardwicke had an unbounded admiration for the balanced eighteenth-century constitution;[3] and, as we have seen, he agreed with Burke and Blackstone in thinking that the powers of all the parts of that constitution—the King, the House of Lords, the House of Commons, and the Courts—must be preserved, and allowed to function independently within their own spheres.[4] It was to the fact that the powers of the various parts of the constitution were thus separated and balanced that he attributed the excellence of English Law and its administration. In a charge which, as Chief Justice, he gave to a grand jury, he said:[5]

'Tis the particular excellence of these laws that they have not been made by the arbitrary will of one man, nor by the humour or ambition or private designs of a few, who have had the fortune to obtain power over their countrymen. But they are Laws establish'd by the tacit concurrence of the whole Nation, who have experienc'd such usages to be just and good, or else compil'd by the joint deliberation and consent of the representative body of this free people in full and free Parliament. . . . The manner of their administration participates of that in which they are made and enacted. For, Gentlemen, such has been the watchful care of our ancestors over the lives, liberties, and estates of Englishmen, that as no law can be made to concern any of those valuable interests without their consent, so no Law can be administered to effect any of these but either originally or finally by the verdict or presentment of a Jury, that is the judgment of their fellow subjects upon their oaths.

In the debate on the Address in 1761, he maintained that the administration of the law in England compared very favourably with its administration in any other country.[6] The judges did not hold office at the pleasure of the Crown. Their places were not saleable. They always gave the reasons for their judgments in public; and that, he said, was the greatest of all securities for their honesty; for "some persons would be ashamed to talk nonsense to the world in support of a judgment that they would suffer themselves to give silently."

[1] Characters and Commentaries 13.
[2] Below 729-730.
[3] Vol. x 715.
[4] Ibid 628, 715.
[5] P. C. Yorke, op. cit. i 144-145.
[6] Parlt. Hist. xv 1012.

Necessarily he claimed that the law and the lawyers played the chief part in the making and the maintenance of this admirable constitution. "The law," he said in his speech on the Habeas Corpus Bill in 1758,[1] "is at the same time the standard and guardian of our liberty. It both circumscribes and defends it. Law without liberty is tyranny, Liberty without law is anarchy and confusion." In the address which he gave in 1736 to a batch of newly created serjeants he stressed the important part played by the legal profession in preserving the just balance of the constitution. He said: [2]

> It is a Profession of the highest importance to the preservation of the true balance of our excellent Constitution and to the administration of public Justice. . . . Have the liberties of the people been at any time in danger from the encroachments of the Crown? The professors of the Common Law have stood in the gap, and been the most zealous as well as the most able Champions of public liberty. Hath the just Prerogative—the lawful power of the Crown—been at any time attack'd by faction or popular fury? The professors of the Law, whose education and studies instruct them how necessary this legal Prerogative is to the peace and good order of the Kingdom, and to the regular enjoyment of property itself, have been found the most strenuous and rational asserters of it.

And because the law and the lawyers occupied this great position in the State, he was very careful to choose the best lawyers as judges; [3] and, unlike some modern politicians, he saw the importance of inducing the best lawyers to accept judicial office by paying them adequate salaries. In 1759 he supported an Act to raise their salaries,[4] and resisted the attempts made to curtail them.[5] In fact, Hardwicke, like Burke [6] and Blackstone,[7] was all his life an "Old Whig" of the Revolution of 1688. The political creed of all these men illustrates the fidelity with which that Revolution had realized the politico-legal ideals for which Coke had contended.[8]

There was no doubt some danger that this unbounded admiration for the constitution and the law would lead to an unintelligent conservatism, and a reluctance to reform obvious abuses. We have seen that Hardwicke to some extent avoided this danger; [9] but not altogether. Thus, although he had got

[1] P. C. Yorke, op. cit. iii 12. [2] Cited ibid i 141. [3] Ibid ii 559.
[4] 32 George II c. 35 § 9; P. C. Yorke, op. cit. iii 20.
[5] In 1759 he wrote to the duke of Newcastle that he could not approve of dropping the augmentation of the judges' salaries as that would be "yielding to wild and malcontent men, and leave the advance made last year to the judges as a fee for the opinion given by them about the Habeas Corpus," ibid iii 54; the charge that the increase in the judges' salaries was a reward for their opinions on the Habeas Corpus Bill, had, according to Horace Walpole, been made by Pitt, ibid iii 19.
[6] Vol. x 44, 95. [7] Below 729-730.
[8] Vol. v 444, 454, 493. [9] Above 249.

the material for a needed reform in the law as to the issue of the writ of habeas corpus, nothing was done to use that material till 1816;[1] and, although it was clear that some radical reforms were needed in the procedure of the court of Chancery, he never attempted to introduce those reforms. We shall see that the fact that, during his long Chancellorship, he neglected to make these reforms, with the result that the procedure of the court steadily deteriorated, has had some important and permanent results upon the later history of equity.[2] In fact, this neglect to make some necessary reforms in the court of Chancery is, I think, the one serious charge which can be brought against Lord Hardwicke as a legal statesman. Many other charges have been brought against him; but this is the only one which has any substance in it;[3] and in his defence many valid excuses can be offered. But of this matter I shall speak later.[4]

As a lawyer he won the universal approval and admiration of his contemporaries; and that judgment has been corroborated by the many generations of lawyers who have studied and applied his decisions. Lord Eldon, for instance, said that he was "one of the greatest lawyers who ever sat in Westminster Hall,"[5] and that he was great "both as a common lawyer and a judge in Equity."[6] In the House of Lords he took a principal part in hearing appeals from the English, Scottish, and Irish courts;[7] and he presided with great dignity, as Lord High Steward, on the trials of the Scottish peers who were tried and convicted for high treason for their share in the rebellion of 1745.[8] In the Privy Council he took a principal part in the hearing of foreign and colonial appeals.[9] But it was as the judge of the court of Chancery that he won the greatest praise from his contemporaries, and the important place which he holds in the history of equity. His courtesy to the bar, even to the youngest and least experienced, his attentiveness to the arguments, and the dignity of his manner in court, commanded, says Ambler, "universal esteem and reverence"; and the care

[1] Vol. ix 121.

[2] Below 295-296.

[3] Most of the charges made by Cooksey's correspondent, Essays 75-93, 100-104, and the charge made by Lord Campbell, Chancellors v 41, that he did not continue Thomson the poet in his office of Secretary of Briefs, are not justified, see P. C. Yorke, op. cit. ii 502-503, 560, 561 n. 5; and very many of Horace Walpole's statements about Hardwicke must be disregarded, since he was animated by feelings of personal hostility; as Harris says, Life of Hardwicke iii 536, most of the accusations made against him are self-contradictory.

[4] Below 291-295.

[5] *Ex parte* Greenway (1802) 6 Ves. at p. 813.

[6] Princess of Wales v. Earl of Liverpool (1818) 1 Wils. Ch. at p. 124.

[7] P. C. Yorke, op. cit. ii 558.

[8] The earls of Kilmarnock and Cromertie and Lord Balmerino were tried on indictments for treason in 1746, 18 S.T. 442 seqq.: Lord Lovat was tried on an impeachment for high treason in 1746-1747, 18 S.T. 530 seqq.

[9] P. C. Yorke, op. cit. ii 558.

with which he stated the facts and the arguments urged by both sides, and the reasons for his decisions, satisfied even those against whom he had decided ; [1] for, as Butler says, he was always " anxious to bring every case decided by him within the application of some general principle." [2] The eloquence with which he pronounced those decisions impressed not only the bar but the outside public. " Multitudes," said Lord Camden,[3] " would flock to hear Lord Hardwicke as to hear Garrick " ; for Lord Mansfield, Burke and Wilkes all agreed that, when he pronounced his decrees, " wisdom herself might be supposed to speak." [4]

But the most eloquent as well as the truest estimate of Hardwicke as Chancellor was pronounced, on November 8, 1756, by the only lawyer of the eighteenth century whose fame rivals his own—Lord Mansfield. The date and the occasion on which that estimate was given were very memorable. Hardwicke was just about to resign and, as we have seen, resigned a few days later.[5] Charles Yorke, his son, had been made solicitor-general two days previously,[6] and was then treasurer of Lincoln's Inn. As treasurer he presided at the farewell dinner given by the Inn to Mansfield, who was taking the degree of serjeant-at-law

[1] Ambler in the Preface to vol. i of his Reports says : " To him I am indebted for the little knowledge I may have attained in the Profession ; and I cannot . . . let this opportunity pass, without expressing my grateful remembrance of the encouragement which, in common with other young Gentlemen at the Bar, I experienced from him. . . . The clear and comprehensive manner in which he delivered his opinions, could not but make the dullest hearer sensible of their weight. He shone in those chief characteristics of a judge, temper and patience. He heard all with attention ; and then decided with readiness, enforcing his decrees with such convincing reasoning as equally gave information to the bar, and satisfaction to the parties. *Etiam quos contra statuit aequos placatosque dimisit.* He greatly encouraged industry in young gentlemen, by showing particular attention to their arguments, and noticing what would permit of approbation. He was engaging and polite in his manner, and yet failed not in every point to support the dignity of his office " ; cp. Bentham's account, Cooksey's Essays 62 ; Fielding, Tom Jones Bk. iv c. 6.

[2] Charles Butler, Reminiscences i 141.

[3] Hardinge's Life, cited Campbell, Chancellors v 361 ; his eloquence, Lord Lyttelton wrote, was

> " That clear, that nervous Eloquence, which scorns
> The Paint of Art, but gives to every Thought
> Its just and native Grace ; whose virtuous Pow'r
> Our conquered Passions rules, but unenthrall'd
> Leaves our enlightened Reason,"

cited P. C. Yorke, op. cit. ii 524 ; a contemporary said that " his address was easy, his aspect gracious and manly, joined with a clear and sonorous voice," cited ibid ii 529 n. 4.

[4] Charles Butler, Reminiscences i 133, speaking of Mansfield says, " he mentioned Lord Hardwicke in terms of admiration and of the warmest friendship. When his lordship pronounced his decrees, wisdom herself, he said, might be supposed to speak. It is somewhat remarkable that both Mr. Burke and Mr. Wilkes described Lord Hardwicke's oratory in these very words."

[5] Above 244-245. [6] Campbell, Chancellors v 395.

preparatory to his becoming Chief Justice of the King's Bench.[1] Mansfield used this occasion to pronounce a panegyric on the father, whom he took the opportunity to recognize as his master in the law, and to congratulate the son, with the eloquence and felicity for which he was famous. He said : [2]

If I have had in any measure success in my profession, it is owing to the great man, who has presided in our highest Courts of Judicature the whole time I attended at the bar. It was impossible to attend him, to sit under him every day, without catching some beams from his light. . . . If we can arrogate nothing to ourselves, we may boast the school we were brought up in ; the scholar may glory in his master, and we may challenge past ages to show us his equal. My Lord Bacon had the same extent of thought, and the same strength of language and expression ; but his life had a stain. My Lord Clarendon had the same abilities, and the same zeal for the constitution of his country ; but the civil war prevented his laying deep the foundations of law, and the avocations of politics interrupted the business of the Chancellor. My Lord Somers came nearest to his character ; but his time was short, and envy and factions sullied the lustre of his glory.[3] It is a peculiar felicity of the great man I am speaking of to have presided very near twenty years, and to have shone with a splendour, that has risen superior to faction and that has subdued envy. I did not intend to have said, I should not have said, so much upon this occasion, but that, in this situation, with all that hear me, what I say must carry the weight of testimony rather than appear the voice of panegyric. For you Sir [addressing the treasurer] you have given great pledges to your country ; and large as the expectations of the country are concerning you, I dare say you will answer them.

Succeeding ages have ratified Lord Mansfield's opinion that his words carried the weight of testimony, and were not merely the voice of panegyric.

Let us now examine the intellectual qualities of the man of whom such words could be truly spoken.

(2) *Lord Hardwicke's intellectual qualities.*

Hardwicke had the quality which, though it is not in itself genius, is necessary to make genius fruitful—an infinite capacity for taking pains. When he first began to study the law he was struck by its " crabbed and barbarous " character ; [4] but he realized, as many lawyers before and since have realized,[5] that it admitted no rival—" its notions," he said,[6] " are so bulky and

[1] Black Books of Lincoln's Inn iii 360-361.

[2] John Holliday, Life of Mansfield 105-106.

[3] It is curious that in his list of famous Chancellors Mansfield did not say anything of Nottingham—the most famous between the time of Bacon and Hardwicke.

[4] Hardwicke Papers, Add. MSS. 35,584 f. 160.

[5] For Roger North's view on this matter see vol. vi 494 ; Hale said, " the law will admit of no rivall nothing to go even with it," Seward's Anecdotes v 409, cited in Runnington's Life of Hale, prefixed to Hale's History of the Common Law (6th ed.) ix ; and Maitland realized it, Fisher, Life of Maitland 178.

[6] Add. MSS. 35,584 f. 160.

ill-shapen that when they once enter the brain they jostle out everything else." His notes of the cases which, from his student days, he took in court,[1] show that he was successful in mastering its bulky and ill-shapen notions. These notes were taken on small slips of paper written on both sides, and they are bound together in small books. They are rough notes; but they contain a clear statement of the facts and the argument, lists of the authorities cited, and a short summary of the judgment, when a judgment was given. These notes were supplemented by more elaborate reports, for which these notes were probably the rough material.[2] The earliest volume of these reports was collected by him "ex relatione amicorum," and he paid 25s. 9d. for its transcription.[3] The later volumes, beginning in 1711, were, down to 1714, compiled by himself, and copied by a clerk. The reports are of cases both in the common law courts and in the court of Chancery—one is the report of a chancery case heard by Cowper at his house.[4] In 1714 there is the following note:[5] "about this time I began to be engaged in business, and the cases which follow in this and the subsequent volumes were copied from the MS. reports of Mr. Strange, afterwards Sir John Strange, Knight"—obviously Hardwicke's industry as a student and a young barrister had had its reward, and he was getting into good practice.

He showed the same qualities of industry and orderliness in his practice as a barrister and law officer. The books of his opinions show that, though the opinions were short, they were based on a careful study of the papers.[6] The books of his briefs,[7] both in common law and Chancery cases, contain notes of his argument written, sometimes in ink and sometimes in pencil, on the back of the sheets of the brief; and, in important cases elaborate arguments on separate sheets of paper.[8] They contain also notes of the arguments of the opposing counsel, and a note of the judgment or decree. As Chief Justice of the King's Bench, as Lord Chancellor, and as a member of the Privy Council he was equally industrious and orderly. There is a regular series of his note-books which contain the cases which he heard in the two former capacities;[9] and, in addition, there

[1] Add. MSS. 36,025-36,027.
[2] Add. MSS. 35,988-35,990.
[3] Add. MSS. 35,987.
[4] Add. MSS. 35,990 f. 142.
[5] Ibid f. 143.
[6] Add. MSS. 36,143-36,144—opinions given as law officer.
[7] Add. MSS. 36,175—briefs in Chancery cases; 36,196—briefs in the courts of King's Bench and Exchequer.
[8] E.g. Add. MSS. 36,196 ff. 109-118—Thornly v. Fleetwood (1720) 5 Bro. P.C. 374.
[9] Add. MSS. 36,028-36,044—note-books of cases heard as Chief Justice of the King's Bench; ibid 36,045-36,069—note-books of cases heard as Lord Chancellor.

are separate books of his judgments in the more important cases.[1] In these last-named books there are elaborate judgments written in his own hand, together with the pleadings and notes of the authorities, and sometimes, in Chancery cases, the minutes of the decree drawn up by himself. It is clear from these books, as indeed from the printed reports, and the accounts of his contemporaries,[2] that he gave careful attention to the arguments of counsel and to the authorities which they cited; and that he was careful in his judgments to explain the reasons why he approved or disapproved of the arguments which had been addressed to him. In the books which contain the appeals heard by him in the Privy Council there are no copies of the judgments. But the decision is indorsed on the printed case; and on the case there are marginal notes and notes of the argument.[3] West spoke truly when he said in his preface to his reports that only those who had had access to Hardwicke's manuscripts "can correctly estimate the care assiduity and labour which he bestowed upon the duties of his high office."

Hardwicke, in the course of his practice, had found it necessary to acquire some knowledge of the Roman civil law, of ecclesiastical law, of international law, and of Scots law.[4] Some of the cases which he decided as Lord Chancellor showed that he was well read in these and other systems of law. He was therefore much more than a merely English lawyer. Cases like *Harvey v. Aston*,[5] *Middleton v. Crofts*,[6] and *Omychund v. Barker*[7] show that he was a good comparative lawyer. He recognized the importance of a knowledge of Roman law—though he rightly insisted that a knowledge of English law was much more important. In the case of *Harvey v. Aston* he said that civil law was "a commendable study and may be useful to the student of the common law, but ought not to interfere with, much less supersede the rules of the common law."[8]

Hardwicke followed this precept as a student and as a practitioner. He had a firm grasp of the principles both of law and equity, largely because he had studied the cases old and new at first hand, and had therefore a competent knowledge of their history. In an argument which he addressed to the court when he was a young barrister, as to the proper wording of a writ of *scire facias* since the Act of Union between England and Scotland, he showed his historical knowledge and acumen, by the manner

[1] Add. MSS. 36,199—cases heard as Chief Justice of the King's Bench; 36,180-36,182—cases heard as Lord Chancellor.

[2] Above 252-253.

[3] Add. MSS. 36,217.

[4] This is apparent not only from the printed reports of his judgments as Lord Chancellor, but also from his opinions as law officer.

[5] (1737) 1 Atk. 361.

[6] (1736) 2 Atk. 650.

[7] (1744) 1 Atk. 21.

[8] Add. MSS. 36,180 f. 59.

in which he traced the origin of the Chancellor's equitable jurisdiction to the fact that he controlled the issue of original writs. Being bound, as to the issue of writs, by the rules of the common law, he found many cases demanding remedy for which no writ was provided. It was to give redress in such cases that he began to give an equitable remedy.[1] Both his knowledge of legal history and his knowledge of other legal systems enabled him to appreciate the truth that the peculiarity of English law was not the fact that it recognized the power of the courts to modify the strictness of the law on equitable grounds, but the fact that the administration of law and equity were entrusted to distinct courts.[2] It was this thorough knowledge of the English legal system, coupled with a knowledge of other systems of law, which gave him that grasp of principle by which his judgments are distinguished. It was these qualities, coupled with his amazing industry and patience, which enabled him so to apply these principles that he almost always reached the right solution in the most difficult and complex cases. It is not surprising that his abilities as a lawyer impressed his legal contemporaries and immediate successors as deeply as his high standard of honour, his eloquence, and his strikingly handsome appearance, impressed the layman.[3] "I am old enough to remember that great judge," said Lord Kenyon,[4] "though but for a short time, before he left the court of Chancery; and the knowledge of those who lived before me only fortified me in the opinion I formed of him, that his knowledge of the law was most extraordinary; he had been trained up very early in the pursuit, he had great industry and abilities, and was in short a consummate master of his profession."

(3) *The nature of Lord Hardwicke's contribution to the modern system of equity.*

The work of so great a lawyer and Chancellor, extending over a period of nearly twenty years, has necessarily left a deep and enduring mark upon the development of the modern system of equity. His great achievement was the settlement of many of the substantive principles of equity in their final form. When he began his work many of these principles had been established and the ground was to some extent covered by precedents, which, though in many cases conflicting, indicated both the problems which awaited solution and alternative methods of solving them.

[1] R. v. Hare and Mann (1719) 1 Stra. at pp. 146-157; Hardwicke, in his letter to Lord Kames, which he wrote in 1759, referred with approbation to this argument "made when I was a very young advocate," and says that it was correctly reported by Strange who had borrowed his papers, P. C. Yorke ii 552.

[2] Wortley v. Birkhead (1756) 2 Ves. Sen. at p. 574; below 266-267; vol. i 446, 449.

[3] Above 253.

[4] Goodtitle v. Otway (1797) 7 T.R. at p. 416.

The fact that he was a consummate lawyer, both industrious and capable of clear and rapid thought, and the fact that he had an exceptionally long tenure of office, enabled him to solve satisfactorily many of these problems, and thus to make his Chancellorship as distinctive a landmark in the history of equity as the chancellorship of Nottingham.[1] On the other hand, he failed to do much to reform the abuses in the practice and procedure of his court. It is true that those abuses were not so great as they became at the end of the eighteenth and the beginning of the nineteenth centuries.[2] It is true that he did something to alleviate them by the orders which he made.[3] It is true that his capacity for quick and sound decision made them less noticeable during his tenure of office.[4] But, after allowing for all these circumstances, the fact remains that he failed to arrest the steady deterioration of that practice and procedure, with the result that, under his less gifted successors, it went from bad to worse. Of these two sides of Hardwicke's activities —his influence upon the substantive, and his influence upon the adjective, rules of equity—I shall deal in this section. I shall deal first with his contribution to the establishment of the substantive principles of equity, and, secondly, with his not very successful attempts to arrest the deterioration of the procedure and practice of his court.

Hardwicke's contribution to the establishment of the substantive principles of equity.

An estimate of Hardwicke's contribution to the establishment of the substantive principles of equity must be based upon the hundreds of cases which he decided during his long tenure of office. The only way in which such an estimate can be made is to take certain important topics, necessarily somewhat arbitrarily selected, and to illustrate from a very few of these many cases the contribution which he made to the establishment of modern equitable doctrine upon these topics. The topics with which I propose to deal in this way are: (i) the leading characteristics of equity; (ii) some leading principles of equity; (iii) bodies of equitable doctrine; (iv) the province of equity.

(i) *The leading characteristics of equity.* We have seen that, from the earliest times, the Chancellors had emphasized the principle that equity follows the law.[5] Hardwicke never lost sight of it. He insisted that the rules governing an equitable

[1] For Nottingham see vol. vi 539-548.
[2] Below 289, 295-296.
[3] Below 288.
[4] Below 294-295.
[5] Vol. iv 279-283.

interest must generally be the same as the rules governing the corresponding legal interest.[1]

And this is to be understood respectively according to the different laws to which the constitution of this kingdom subjects that kind of property which happens to be in question. If it is a legatary or testamentary matter the king's ecclesiastical law; if a maritime matter the Admiralty law; if a matter concerning a real estate the common law of the land.[2]

Thus if a person entitled to a portion payable out of land died before it became payable, the portion was not raised; but, if a person entitled to a legacy died before it became payable, his executor was entitled—"and the ground of this distinction is that the court for uniformity follows the ecclesiastical courts in the one case, and the common law in the other." [3] On similar principles equity must put the same construction on statutes as that put upon them by the common law.[4] But, if necessary, it would, both in respect to the common law and the statute law, go beyond the law, and extend the principle underlying the law to cover analogous cases which fell under the same principle; [5] and, in order to follow out the consequences of its own principles it might be necessary to make departures from the strict legal rules.

An instance of the manner in which equity went beyond the rules of the common law is to be found in its treatment of waste. It gave rights of action to persons who had none at common law; [6] and, by restraining the legal rights of tenants without impeachment of waste, it created the doctrine of equitable waste.[7] Similarly, "as to the manner of conveyancing, many acts will pass a trust estate that will not pass a legal estate." [8] An instance of the manner in which equity went beyond the rules of statute law is to be found in the statutes of forcible entry. The remedy given by these statutes was given only to the person who had the legal estate; but equity would give

[1] "*Aequitas sequitur legem* is the allowed general maxim of this Court; the meaning of which is, that wherever equity places the trust or beneficial interest in anything, it is (generally speaking) governed by the like rules as the legal property in that thing would be governed by," Harvey v. Aston (1738) West t. Hard, at p. 425.

[2] Ibid. [3] Ibid 1 Atk. at pp. 379-380.

[4] "I must consider this act of Parliament 13 Elizabeth c. 5 as it would have been considered at law, for I will not lay down any other rules of construction in equity, than is followed at law upon this statute," Russel v. Hammond (1738) 1 Atk. at p. 15; "if parliamentary provisions as to a legal interest were not to be followed as to equitable interests, it would defeat the Act. Thus upon the Popish acts, tho' penal, the considerations and rules are the same in equity as at law," Ryall v. Rolle (1749) 1 Atk. at p. 184.

[5] "When this court finds out the law of the land in any instances, they will follow and extend it to other cases that are analogous. If they will do so on the general law, why not on the statute law," Paget v. Gee (1753) Amb. at p. 200.

[6] Vol. vii 279-280; cp. Robinson v. Litton (1744) 3 Atk. at p. 210.

[7] Vol. vii 278. [8] Carte v. Carte (1744) Amb. at p. 31.

similar relief to a person who had only an equitable estate.[1] The following case put by Hardwicke is an instance of a case in which a departure from legal rules was rendered necessary in order to give effect to the principles of equity :

> Suppose A devises his real estate, a feoffment in fee to the use of himself subsequent to the will is a revocation of it ; but a subsequent mortgage would not be a revocation in this Court, because it is only a security for a debt, and the devisee would take the legal estate subject to the charge.[2]

As Hardwicke explained in his letter to Kames, new commercial conditions, new modes of dealing with property, and new forms of property had compelled equity to make new rules ; [3] and if a case was covered by no authority he did not hesitate to make a new rule for which there was no precedent either at common law or in equity.[4] These principles were acted upon both by Hardwicke and by his predecessors,[5] with the result that, during the first half of the eighteenth century, equity was more receptive of new ideas, and therefore more progressive, than the common law.[6] It was not till Lord Mansfield, who boasted that he was Hardwicke's pupil,[7] became Chief Justice, that the common law showed itself able and willing to adapt itself to a changing world by the adoption of some of those rational principles, by means of which Hardwicke and his predecessors had been developing the system of equity.[8]

That equity, under Hardwicke's guidance, was able to develop so rapidly into a settled system possessed of definite principles and rules, and at the same time to preserve its capacity to keep itself abreast of modern needs and ideas, was due to the manner in which Hardwicke combined a respect for ascertained principles with a respect for and a reliance upon those ethical considerations, upon which equity was originally founded.

[1] Paget v. Gee (1753) Amb. at p. 200.

[2] Carte v. Carte (1744) Amb. at p. 31.

[3] P. C. Yorke, op. cit. ii 555, cited vol. i 466-467.

[4] " No case has been cited to me, either on one side or the other and therefore I must make a precedent, and determine it on the rules of equity," *ex parte* Prescot (1753) 1 Atk. at p. 230; " this is a new case; no precedent has been cited; but I am of opinion it is so strong, I shall make it a precedent," Paget v. Gee (1753) Amb. at p. 198.

[5] Above 227, 228-229.

[6] " We may roughly say that the Chancellors deliberately administered an expansive and inventive justice down to the time of the Revolution, and practically did so for almost a century later. . . . We should also note . . . the reaction of the methods and spirit of Equity (and ultimately, to an extent perhaps greater than is commonly allowed, of the general development of European thought) upon the development of the common law," Pollock, Oxford Lectures 27-28.

[7] Above 254.

[8] " The rational and ethical tendency became a real power in the common law in the eighteenth century. Lord Mansfield, its most illustrious exponent, sometimes carried it further than a mature system would bear," Pollock, Oxford Lectures 28 ; for Mansfield's great work in this direction see below.

Hardwicke would never make a decree contrary to an ascertained principle, although he personally did not agree with the principle.[1] He expressly approved a dictum of Lord Trevor to the effect that, if a rule had become an accepted rule, "though some should not be satisfied in their private judgments, yet it is reasonable to determine the same way to prevent the mischiefs that might arise from the uncertainty of the law."[2] At the same time, he approved of a saying of Hobart, C.J., to the effect that, if an application of the strict rules of law appeared likely to frustrate the intention of the parties, judges should be astute to distinguish them;[3] and, if precedents were conflicting, he did not hesitate to overrule those which he did not approve, even though they included one of his own making.[4] In a difficult case he did not hesitate to adjourn a final decision till a search had been made for precedents; and, on a consideration of these precedents, he did not hesitate to alter his previously expressed opinion[5]—"I always thought it," he said,[6] "a much greater reproach to a judge to continue in his error than to retract it." At the same time he discountenanced the drawing of superfine distinctions, and, like Nottingham,[7] he considered that "it would be the strangest thing in the world for a court of equity to determine upon such nice distinctions, and very slight arguments, which would never stand with the reason of mankind without doors."[8] Hardwicke thus recognized that, even though hardship might be caused to individuals, established rules must be applied;[9] and, consequently, that there were hardships and anomalies for which, since no remedy could be given by equity, a remedy must be sought from the Legislature.[10] "Whatever

[1] Prowse v. Abingdon (1738) 1 Atk. at p. 485; in the case of Casborne v. Scarfe (1737) 1 Atk. at p. 606, to the argument that the rules as to dower and curtesy out of equitable estates ought to be the same (vol. iii 188, 196), Hardwicke replied that it failed "by the precedents of this court," and that if any innovation was to be made the best way would be to allow dower out of a trust estate; and see Trelawney v. Booth (1742) 2 Atk. 307, cited below 270.

[2] Sparrow v. Hardcastle (1752) Amb. at pp. 227-228.

[3] Newcoman v. Bethlem Hospital (1741) Amb. at p. 789.

[4] In the case of Tuckfield v. Buller (1753) Dick, at p. 243, which was an appeal from the Master of the Rolls, he said, "a case of Davenport v. Oldis said to have been determined by me, hath been cited in support of the decree: I might make such a decree; and I am apt to think others similar to it may be found, but I think them wrong; and thinking them so, it is proper they should be set right."

[5] Galton v. Hancock (1743) 2 Atk. 427. [6] Ibid at p. 439.

[7] Vol. vi 541 n. 1. [8] Lee v. Cox (1746) 3 Atk. at p. 422.

[9] "I might at first be influenced by the appearance of hardship in this case on the part of the heir. But the rule of a court of equity in marshalling of assets is of great consequence to the practice of this court, and ought to countervail any arguments of hardship to particular persons," Galton v. Hancock (1743) 2 Atk. at p. 439; "this is an unfortunate case; but I cannot help it; for I must not lay down a rule, which will make the right of creditors precarious," Townshend v. Windham (1750) 2 Ves. Sen. at p. 11.

[10] Montgomery v. Clark (1742) 2 Atk. at p. 379; in the case of Ridout v. Earl of Plymouth (1740) 2 Atk. at p. 106, Hardwicke advised the parties to apply for a

may be called a legislative authority in this court," he said, "I utterly disclaim." [1]

But, though precedents must be followed and ascertained principles and rules enforced, Hardwicke maintained that his court was a court of conscience.[2] He explained his view as to the part played by conscience in the administration of equity in his letter to Kames.[3]

> Some general rules there ought to be, for otherwise the great inconvenience of *Jus vagum et incertum* will follow; and yet the Praetor must not be so absolutely and invariably bound by them, as the judges are by the rules of the common law; for if he were so bound, the consequence would follow . . . that he must sometimes pronounce decrees which would be materially unjust. . . . This might lay a foundation for an equitable relief, even against decrees in equity, and create a kind of superfoetation of courts of equity.

Thus many of the rules which regulate trusts and mortgages were well ascertained.

> But as to relief against frauds, no invariable rules can be established. Fraud is infinite, and were a court of equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidences of it, the jurisdiction would be cramped, and perpetually eluded by new schemes which the fertility of man's invention would contrive.

How wide an extension the Chancellor gave to the conception of fraud can be seen from his analysis, in the case of *Chesterfield v. Janssen*, of the different varieties of sharp practice which could be brought under that head [4]—an analysis which has helped courts of equity from that day to this to give relief in cases in which no relief at common law could be given.[5]

At the same time Hardwicke, like Nottingham,[6] insisted that the conscience which guided the Chancellor must be regulated by the rules of equity.[7] The Chancellor might consider that a

private Act of Parliament for the sale of the testator's real and leasehold estates in order to satisfy the charges thereon; in the case of Attorney-General v. Day (1748-1749) 1 Ves. Sen. at p. 224, he gave the same advice so that an infant might get power to convey property, "which," he said, "would deliver me from all my difficulties."

[1] Chesterfield v. Janssen (1750) 1 Atk. at p. 353.

[2] "This court is a court of conscience. I shall give my opinion in this case according to my conscience," Scroggs v. Scroggs (1755) Amb. at p. 814; it was a case where it was alleged that the execution of a power had been procured by misrepresentation.

[3] P. C. Yorke, op. cit. ii 554.

[4] (1750) 1 Atk. at pp. 351-353; even the provisions of a statute would be disregarded if they were being made a cloak for fraud, Attorney-General v. Day (1748-1749) 1 Ves. Sen. at p. 221; below 272.

[5] Thus the principles there laid down by Hardwicke were cited and applied by Scrutton L.J. in the case of Lancashire Loans Co. v. Black [1934] 1 K.B. at pp. 403-404.

[6] Vol. vi 547; above 228.

[7] After saying that the remedy of specific performance was discretionary, he added that "it ought to be understood in this manner, that it is discretionary on certain grounds, and not arbitrary, but governed by rules of equity," Goring v. Nash (1744) 3 Atk. at p. 188.

course of conduct was morally and conscientiously right, and yet have no power to decree it.[1] On the other hand, he had far greater power than the courts of common law to give due weight to conscientious considerations. The common law could not pay attention to the motives of a plaintiff; but the court of Chancery, in considering whether or not to grant an injunction, could take them into consideration.[2] Similarly, it was possible for the court to take into consideration all the circumstances of a case, in order to see whether it was fair that a remedy should be given, and, if so, upon what conditions;[3] for a considerable scope was and still is left for the application of the Chancellor's ideas of justice and public policy[4] by the rule that all equitable remedies are discretionary. Another instance of the influence of conscience, which was not so salutary since it helped to lengthen the course of a suit, was the rule that, though a court of law could not grant a new trial if the verdict was not against the weight of evidence, the court of Chancery could grant successive new trials till the conscience of the court was satisfied.[5] I think that these instances show first, that the conscience still played some part, though a part subordinate to the ascertained principles of equity; and, secondly, that this fact accounts for the flexibility of the principles of equity, and their capacity for expansion, which, at this period, made these principles a very necessary supplement to the rules of the common law.

[1] "If a bankrupt after his discharge gets future effects, in point of justice and conscience he ought to make good the deficiency, though no court of equity or praetor would do it for the creditor," *Ex parte* Burton (1744) 1 Atk. at p. 256; sometimes if the case was very hard Hardwicke would let it stand over to see if a compromise could be arranged, see Priest v. Parrot (1750-1751) 2 Ves. Sen. at p. 161.

[2] "It frequently happens there may be a just cause of action, yet the real motives may be very unjust, which a court of equity will always take into their consideration, though they cannot at law pay any regard to it," Roy v. Duke of Beaufort (1741) 2 Atk. at p. 194.

[3] "It is within discretion of the court, whether they will decree a specific performance, because otherwise, as I said before, a decree might be made which would tend to the ruin of one party," Buxton v. Lister (1746) 3 Atk. at p. 386; "every common trespass is not a foundation for an injunction in this court, where it is only contingent and temporary; but if it continues so long as to become a nuisance, in such a case the court will interfere and grant an injunction," Coulson v. White (1743) 3 Atk. 21; cp. Jesus College v. Bloom (1745) 3 Atk. 262; similarly, the court had more discretion as to the allowance of pleas in abatement or in bar than the common law courts, though not in respect of pleas to the jurisdiction, Foster v. Vassall (1747) 3 Atk. at p. 589; Hardwicke recognized that there were cases decided so much on their special circumstances that they could not be regarded as precedents, Coventry v. Coventry (1742) 2 Atk. at p. 370.

[4] "Political arguments in the fullest sense of the word, as they concern the government of a nation, must, and have always been of great weight in the consideration of this court, and tho' there may be no *dolus malus*, in contracts as to other persons, yet if the rest of mankind are concerned as well as the parties, it may properly be said, that it regards the public utility," Chesterfield v. Janssen (1750) 1 Atk. at p. 325; cp. Methwold v. Walbank (1750-1751) 2 Ves. Sen. 238 where, on grounds of public policy, Hardwicke dismissed a bill to carry out an agreement to assign the fees of a gaoler and the profits of the tap-house.

[5] Stace v. Mabbot (1754) 2 Ves. Sen. at pp. 553-554.

Just as considerations of conscience made for the flexibility of the principles of equity and their capacity for expansion, so one particular effect of this element of conscience has had the effect of giving to the court of Chancery a wider jurisdiction in respect of foreign land than that possessed by the courts of law. From the first equity had acted upon the conscience of the defendant, in order to purge and rectify it.[1] It therefore acted *in personam;* and though the methods by which the court enforced its decrees were no longer wholly personal, though it could sequester or deliver possession of the property of the defendant as well as imprison him for disobedience to its process,[2] it did not cease to adhere to its original idea that it could proceed against the person of anyone who was within its jurisdiction, and order him to fulfil his equitable obligations. This application of the principle that equity acts *in personam*, which is at the present day its most important though not the only application,[3] appears in several of Hardwicke's decisions.[4] It was finally sanctioned in the case of *Penn v. Lord Baltimore* [5]—a suit to establish an agreement as to the boundaries of Maryland and Pennsylvania which was, as Hardwicke said, " of a nature worthy the judicature of a Roman senate rather than of a single judge." [6] The court, as Hardwicke pointed out, had no jurisdiction to adjudicate on the original right as to the boundaries—that fell under the jurisdiction of the Privy Council.[7] But " the conscience of the party was bound by this agreement; and being within the jurisdiction of this court, which acts *in personam*, the court may properly declare it as an agreement." [8] It is true that since this particular agreement was made in England, the parties could sue at common law for the breach of it.[9] But the court of Chancery alone could order it to be specifically performed; [10] and since it could order it to be specifically performed, it could do what a court of law was unable to do—exercise, by means of its jurisdiction over

[1] Vol. iv 281; vol. v 216; above 228, 262 n. 2.

[2] Vol. ix 352; Penn v. Lord Baltimore (1750) 1 Ves. Sen. at p. 454; Ashburner, Equity (2nd ed.) 31-32.

[3] See Ellerman Lines v. Read [1928] 2 K.B. at pp. 155-156, *per* Atkin, L.J.

[4] See Roberdeau v. Rous (1738) 1 Atk. 543; Foster v. Vassall (1747) 3 Atk. at p. 589.

[5] (1750) 1 Ves. Sen. 444.

[6] Ibid at p. 446.

[7] Ibid at p. 447.

[8] Ibid at p. 447.

[9] This bill " is founded on articles executed in England under seal for mutual consideration; which gives jurisdiction to the King's courts both of law and equity whatever be the subject matter. An action of covenant could be brought in B.R. or C.B. if either side committed a breach: so might there be for the £5,000 penalty without going to the council," ibid.

[10] " Suppose an order by the King and council in a case wherein the King and council had original jurisdiction; and the parties enter into an agreement under hand and seal for performance thereof: a bill must be in this court for a specific performance. . . . The reason is, because none but a court of equity can decree this," ibid.

persons within that jurisdiction, a power to give orders as to the disposition of land situate out of its jurisdiction.[1]

Thus the older characteristics of the equitable jurisdiction of the court of Chancery—its dependence upon the law, the manner in which it compelled individuals to use their legal rights and to order their conduct in accordance with the dictates of conscience, and its consequent action upon the person of the individual litigant—were combined with the later characteristics of that jurisdiction—its tendency to develop settled rules and therefore definite bodies of equitable doctrine. The older characteristics, though modified by the later characteristics, helped to correct the rigidity produced by the latter, and so gave equity a capacity for expansion and development which was very necessary if English law was to meet the new needs of a changing age. Under the two following headings I shall consider the manner in which Hardwicke helped to develop, under these conditions, some of the leading principles of equity and certain bodies of equitable doctrine.

(ii) *Some leading principles of equity.* First, we have seen that equity was acquiring a certain number of rules as to the resemblances and the differences between legal and equitable estates.[2] Equity recognized the same estates as the common law, and gave to those estates some of the same incidents as they possessed at common law. Thus there could be an estate tail of a trust estate, which could be barred by a fine or a recovery.[3] "A court of equity," said Hardwicke, "will in many cases dispense with the ordinary forms in passing estates, but will never introduce any rules which may vary the nature of them at common law."[4] This was largely, but not wholly true. A husband was entitled to curtesy out of an equitable estate, but a wife was not entitled to dower.[5] Equitable estates could never be gained, as legal estates might be gained, by wrong; and "therefore on a trust in equity, no estate can be gained by disseisin, abatement, or intrusion."[6] An equitable tenant for life could not

[1] "Courts of equity have from the time of Lord Hardwicke's decision in *Penn v. Lord Baltimore* . . . exercised jurisdiction *in personam* in relation to foreign land against persons locally within the jurisdiction of the English court in cases of contract, fraud, and trust, enforcing their jurisdiction by writs of *ne exeat regno* during the hearing, and by sequestration, commitment, or other personal process after decree," Companhia de Moçambique v. British South Africa Co. [1892] 2 Q.B. at p. 364, *per* Wright J.; "for centuries the Court of Chancery has, by virtue of its jurisdiction *in personam*, applied against parties to a contract or trust relating to foreign land the principles of English Law, although the *lex situs* did not recognize such principles," British South Africa Co. v. De Beers Consolidated Mines [1910] 2 Ch. at p. 513, *per* Cozens-Hardy M.R.

[2] Vol. vii 144-149. [3] Ibid 148.

[4] Pullen v. Lord Middleton (1753) 9 Mod. at p. 484.

[5] Vol. iii 188, 196; vol. vii 148; above 261 n. 1.

[6] Hopkins v. Hopkins (1738) 1 Atk. at p. 591; cp. vol ii 583; vol. vii 25.

destroy the contingent remainders dependent upon his estate ; [1] and mergers were not allowed to affect equitable estates if the effect was to promote injustice.[2] In fact, though equity faithfully followed the law in the variety of estates which it recognized, it retained considerable power to mould the incidents of these estates in accordance with its ideas of justice and public policy. For instance, money directed to be laid out on land was regarded as land, not by the law, but only by equity, so that equity could allow a married woman absolutely entitled to the money to dispose of it as personalty after separate examination, just as she could dispose of the legal estate in land by a fine after separate examination ; for equity "can act upon its own creature and do what a fine at common law can upon land." [3] We shall see that the most striking instance of this power assumed by equity to "act upon its own creature," and mould the incidents of equitable estates as it thought right, was the invention at the end of the century of the restraint against anticipation.[4]

Secondly, the growing distinctness of these equitable estates, which was made possible by the view that the modern trust, unlike the mediæval use, was attached, not to the conscience of the trustee, but to the property itself,[5] made it clear that the Chancellors had created an equitable ownership which was different from legal ownership ; and that the nature of this equitable ownership and its relation to legal ownership was peculiar to English law. It was well settled that an equitable owner had a good right as against all the world except as against a *bona-fide* purchaser for value of the legal estate without notice ; [6] and that therefore if a third mortgagee, who had taken his mortgage without notice of a second, could get in the legal estate of the first mortgagee, he could tack his third mortgage to the first and squeeze out the second.[7] He could use the legal estate, it was said, as a *tabula in naufragio*, because there is no equity to take away a legal estate from a *bona-fide* purchaser without notice until his whole debt is satisfied.[8] Hardwicke noted this unique characteristic of equitable ownership and its unique relation to legal ownership ; and he gave an historically correct explanation of it when he said that it was due to the fact

[1] Hopkins v. Hopkins (1738) 2 Atk. at pp. 591-592.
[2] Ibid at p. 592.
[3] Oldham v. Hughes (1742) 2 Atk. at p. 454.
[4] Below 325.
[5] Vol. vii 145-146.
[6] Vol. iv 432 ; vol. vii 145.
[7] Vol. vi 665 ; Marsh v. Lee (1670) 1 Ch. Cas. 162.
[8] The principle was settled "in *Marsh v. Lee* by a very solemn determination by Lord Hale, who gave it the term of the creditor's *tabula in naufragio :* that is the leading case. Perhaps it might be going a good way at first ; but it has been followed ever since, and I believe, was rightly settled only on this foundation, by the particular constitution of the law of this country," Wortley v. Birkhead (1754) 2 Ves. Sen. at pp. 573-574.

that law and equity were administered in separate courts, and that equity must follow the law, and allow the legal owner all the advantages of his legal ownership, if no equity affecting his conscience existed. Dealing with this doctrine of *tabula in naufragio* he said : [1]

> It could not happen in any other country but this : because the jurisdiction of law and equity is administered here in different courts, and creates different kinds of rights in estates ; and therefore as courts of equity break in upon the common law, when necessity and conscience require it, still they allow superior force and strength to a legal title to estates ; and therefore where there is a legal title and equity on one side, this court never thought fit, that by reason of a prior equity against a man, who had a legal title, this man should be hurt, and this by reason of that force this court necessarily and rightly allows to the common law and to legal titles. But if this had happened in any other country, it could never have made a question ; for if the law and equity are administered by the same jurisdiction the rule, *qui prior est tempore potior est jure*, must hold.

It followed from this that the question whether or not a legal owner had notice when he took his estate was of vital importance to the title of an equitable owner. Cases as to when notice could be constructively imputed, and when it could not, were beginning to accumulate ; [2] and in the famous case of *Le Neve v. Le Neve* [3] it was held, by a somewhat strained construction, that a man who had registered his title under the Middlesex Registry Act 1708 [4] with notice of a prior unregistered incumbrance, took subject to that incumbrance.

Thirdly, just as the purchaser of a legal estate must not only have no notice, but must also have given value,[5] so a person who wished to enforce his equitable interest must in many cases have given value. As a general rule equity would not interfere in favour of a volunteer. This rule was recognized by Hardwicke.[6] But marriage was a valuable consideration, and therefore the spouses and their children were not volunteers ; and this applied to the children of an earlier marriage, so that if they and the children of the marriage were given interests under marriage articles, they could sue for the specific execution of the articles.[7]

[1] Wortley v. Birkhead (1754) 2 Ves. Sen. at p. 574.

[2] Lowther v. Carlton (1741) 2 Atk. 242 ; Warrick v. Warrick (1745) 3 Atk. at pp. 293-294 ; Worsley v. Earl of Scarborough (1746) 3 Atk. 392.

[3] (1748) 3 Atk. 646.

[4] 7 Anne c. 20 ; this construction was founded on the construction put upon the statute of Enrolments 27 Henry VIII c. 16, vol. iv 455 n. 4, 462, Le Neve v. Le Neve (1748) 3 Atk. at pp. 652-653 ; vol. xi 587-588.

[5] Vol. iv 432 ; vol. vii 145.

[6] " As to the objection that this being a voluntary agreement, a court of equity will not interpose, it is certainly a general rule, when it has been entered into without any fraud," Morris v. Burroughs (1737) 1 Atk. at p. 401.

[7] Newstead v. Searles (1737) 1 Atk. at pp. 267-268 ; cp. De Mestre v. West [1891] A.C. at pp. 269-270, *per* Lord Selborne.

But this reasoning did not apply to articles in favour of remoter relations, who were outside the marriage consideration; so that, since they were mere volunteers, they could not enforce specific execution of the articles as against the interests of purchasers or creditors.[1] We shall see that the equitable relief which falls under the following head was in many cases not given if the applicant was a volunteer.

Fourthly, equity looked at the substance and not the form of a transaction, and, in spite of defects of form, tried to carry out the real intention of the parties.[2] Thus the court would, in favour of a wife [3] or husband,[4] supply a defect in the execution of a power; but it would only give this relief to a person who had given valuable consideration; [5] and we shall see that the validity of the assignment of a possibility or a chose in action also depended upon the question whether valuable consideration had been given.[6] We have seen that another instance of the application of the principle that equity looked at the substance rather than the form of a transaction, was the manner in which it controlled the operation of the common law doctrine of merger; [7] and this principle was clearly stated by Hardwicke.[8] But it was recognized that an otherwise valid claim to equitable relief might be barred by laches. Thus if it was sought to prove by parol that a devisee was bound by a trust, Hardwicke laid it down that such a demand "should be pursued very recently for the danger of perjury intended to be prevented by the statute, increases much more after length of time." [9]

Fifthly, a very large number of the cases which came before the Chancellor were cases which involved questions of the construction of settlements and wills. Just as the Chancellor tried to give effect to the substance of a transaction in spite of defects of form, so he tried in these cases of construction to give effect to the intention of the parties so far as the rules of law

[1] "I mention this to shew that the distinction has already been taken and that it is one consideration how far the court will support agreements of this kind against relations in a family and against purchasers and creditors," Goring v. Nash (1744) 3 Atk. at p. 188; the modern cases would seem to show that even against relations in a family these agreements cannot be enforced by a volunteer, see *Re* Anstis (1886) 31 C.D. 596; *Re* Plumptre's Settlement [1910] 1 Ch. 609.

[2] Above 260, 265. [3] Hervey v. Hervey (1739) 1 Atk. at p. 563.

[4] Sergeson v. Sealey (1742) 2 Atk. at p. 415.

[5] Vol. vii 187-188; above 267; Wilkes v. Holmes (1752) 9 Mod. at p. 486; Hervey v. Hervey at pp. 565-566.

[6] Below 270. [7] Above 266.

[8] "In the cases of merger there are many instances where there would be mergers of legal estates, and yet courts of equity have never suffered mergers of trusts, when the legal estate continued in the trustees, but have been against the merger if the justice of the case required it," Hopkins v. Hopkins (1738) 1 Atk. at p. 592.

[9] Whitton v. Russell (1739) 1 Atk. at p. 449; the statute referred to is the Statute of Frauds §§ 5 and 6 which prescribed formalities for the making of a will of real property, vol. vi 385.

permitted him to do so. But, in deciding these cases, certain presumptions emerged in certain common cases which gave rise to substantive principles of equity. It was in this way that the doctrines of satisfaction, ademption, election, and conversion emerged. We shall see in the Second Part of this Book that these were well-established doctrines when Hardwicke became Chancellor; and the following illustrations show that his decisions both emphasized the principles already established, and added something to them.

In the case of *Bellasis v. Uthwatt*[1] he emphasized the rule that the question whether or not a legacy would satisfy a portion debt, must depend upon the intention of the parties to be gathered from the circumstances of the case;[2] and he laid down the rule that in such cases

> when a bequest is taken to be by way of satisfaction for money before due, the thing given in satisfaction must be of the same nature, and attended with the same certainty, as the thing in lieu of which it is given, and land is not to be taken in satisfaction for money, nor money for land.[3]

In the case of *Shudal v. Jekyll*[4] he laid it down that the presumption that a legacy was satisfied by a portion could not apply when the donor was not a parent or *in loco parentis*, but a remote relation. In the case of *Lee v. Cox*[5] he held that the receipt by a wife of her share under the statute of Distributions was a satisfaction of an obligation to give her a smaller amount than that share amounted to. In the case of *Clark v. Sewell*[6] he approved the rules which distinguished between the cases of the satisfaction of debts by legacies, and the satisfaction of portions by legacies.[7] In the case of *Farnham v. Phillips*[8] he said that the rule that "where a father, after making his will, advances his child with a portion, as great or greater than the legacy given by the will," such provision adeems the legacy, was a well-settled rule of equity;[9] but that, if the gift by will was only a gift of residue, which is necessarily uncertain in amount, there was no ademption.[10] In the case of *Hearle v. Greenbank*[11] he

[1] (1737) 1 Atk. 426. [2] At p. 427. [3] At pp. 427-428.
[4] (1742) 2 Atk. 516. [5] (1746) 3 Atk. 419. [6] (1744) 3 Atk. 96.
[7] "In later cases the courts have said this doctrine has been carried too far, *for legacies naturally imply a bounty*, and therefore, though the courts of late have not altogether disavowed this doctrine of satisfaction, yet they have been very inclinable to lay hold of any circumstances to distinguish the latter from the former cases. . . . What I have said hitherto, I confine to the satisfaction of debts, for I agree the cases of satisfaction of portions have gone further, for when both the provisions move from the father to the same persons, and for the same purposes, the court, which always leans against incumbring estates twice over, will overlook little circumstances of time as to the payment of the two sums to children, if it appears to be a double portion," ibid at pp. 97-98.
[8] (1741) 2 Atk. 215. [9] At p. 216.
[10] Ibid. [11] (1749) 3 Atk. 695.

laid down the important principle that, to raise a case of election, there must be a valid disposition of property belonging to the donor.

When a man executes a will in the presence of two witnesses only [1] and devises his real estate from his heir at law, and the personal estate to the heir at law; this is a good will as to personal estate, yet for want of being executed according to the statute of frauds and perjuries, is bad as to the real estate; and I should in that case be of opinion, that the devisee of real estate could not compel the heir at law to make good the devise of the real estate, before he could entitle him to his personal legacy, because here is no will of real estate for want of proper forms and ceremonies required by the statute.[2]

The doctrine of conversion was so well settled that Hardwicke felt bound to apply it to a case where it produced hardship and substantial injustice. A lent B £500 on a promissory note, on B's assurance that his aunt had left him £4,000 by her will. The aunt had left him £4,000, but had directed that the money should be laid out in land. Therefore it was land and could not be made available for a simple contract creditor. Hardwicke said that it was a cruel case, "and yet the plaintiff can have no relief, as it is the established rule of the court, that money devised to be laid out in land, shall be considered as land." [3]

Lastly, equity recognized the proprietary character, and therefore the assignability, of such things as possibilities and choses in action, which were not recognized by the common law. A mere possibility or contingency could be released in equity,[4] or it could be assigned for value.[5] It followed that a husband could release a debt due to his wife, or could assign a chose in action or a possibility belonging to his wife, provided that the assignment was for a valuable consideration.[6]

(iii) *Bodies of equitable doctrine.* Just as Hardwicke's decisions added certainty and precision to the leading principles of equity, so they made considerable developments in some of the principal bodies of equitable doctrine.

Trusts. Some of Hardwicke's decisions bring out the difference between a public charitable trust, and a trust which was

[1] The Statute of Frauds required three witnesses, vol. vi 385.

[2] At p. 715; but if the will contained a clause to the effect that, if a beneficiary under it disputed it, he should forfeit any benefits given by it, the heir would be put to his election, Boughton v. Boughton (1750) 2 Ves. Sen. 12; at pp. 14-15 Lord Hardwicke gives a good account of the development of the doctrine of election, and of his own decision in Hearle v. Greenbank.

[3] Trelawney v. Booth (1742) 2 Atk. 307.

[4] Medcalfe v. Medcalfe (1737) 1 Atk. at p. 64.

[5] Grey v. Kentish (1749) 1 Atk. at p. 280.

[6] "The husband may assign the wife's chose in action, or a possibility that the wife is entitled to, as well as her term, so that it be not voluntary, but for a valuable consideration; but though he cannot dispose of her chose in action without a valuable consideration, yet he may release the wife's bond without receiving any part of the money," Bates v. Dandy (1741) 2 Atk. at p. 208.

not public because it was intended to benefit a particular set of persons.[1] Another decision made it clear that any increase in the funds devoted to charity must go to the charity.[2] Hardwicke also made it clear that, if there was a visitor, his jurisdiction ousted the jurisdiction of the court [3]—a conclusion which he pointed out was desirable on grounds of convenience ; [4] and in the case of *Green v. Rutherford* [5] he stated the limits of the visitatorial jurisdiction. His decision in the case of *Da Costa v. De Pas* [6] laid down the principle that where a testator had created a trust which was illegal, because, being for the support of the Jewish religion it was contrary to the Christian religion,[7] but where at the same time he had manifested a charitable intention, the Crown by sign manual could direct that it should be applied to a charitable purpose which was lawful. If the trust had been illegal and not charitable there would have been a resulting trust to the testator's heir or next-of-kin ; but since a charitable intention had been manifested the funds must be applied *cypres* to a legal charity.[8] This was a logical application of the principles applicable to charitable trusts ; but it led to an absurd result ; for, as Grant, M.R., pointed out in the case of *Cary v. Abbot*,[9] the court in effect had decided that,

> whenever a testator is disposed to be charitable in his own way, and upon his own principles ; we are not to content ourselves with disappointing his intention, if disapproved of by us : but we are to make him charitable in our way and upon our principles. If once we discover in him any charitable intention, that is supposed to be so liberal as to take in objects, not only within his intention, but wholly adverse to it.[10]

[1] In the case of Attorney-General v. Pearce (1740) 2 Atk. at p. 88 he said, " when testators have not any particular person in their contemplation, but leave it to the discretion of a trustee to chose out the objects, though such person is private, and each particular object may be said to be private, yet in the extensiveness of the benefit accruing from them they may very properly be called publick charities " ; but a voluntary society formed to benefit necessitous members is only a private charity, Anon. (1745) 3 Atk. 277 ; cp. Carne v. Long (1860) 2 De. G.F. and J. 75.

[2] Attorney-General v. Johnson (1753) Amb. 190, followed by the M.R. in Attorney-General v. Sparks (1753) Amb. 201 ; above 225-226.

[3] Attorney-General v. Talbot (1747) 3 Atk. at pp. 673-674.

[4] " Though it is said, *boni judicis est jurisdictionem ampliare*, I am extremely disinclined to encourage such suits, which may take off those learned bodies from their studies, and ingross their time very improperly," ibid at p. 676.

[5] (1750) 1 Ves. Sen. at pp. 372-375.

[6] (1754) Amb. 228 ; there is a fuller report in 2 Swanst. 487 *note ;* see also Lord Eldon's account of this case from Hardwicke's notes in Moggridge v. Thackwell (1803) 7 Ves. at pp. 75-77.

[7] For the views held as to the illegality of such trusts, which rested on the ground that Christianity is part of the law of England see vol. viii 409.

[8] Amb. 228 ; in fact the money was given to the Foundling Hospital.

[9] (1802) 7 Ves. at p. 495.

[10] Lord Eldon agreed ; he said in Attorney-General v. Mayor of Bristol (1820) 2 Jac. at W. at p. 308 that " it would have caused some surprise to the testator if he had known how his devise would have been construed."

Just as Hardwicke's decisions upon charitable trusts elucidated some of their leading characteristics, so some of his decisions as to the principal varieties of private trusts gave precision to principles already established. There are decisions as to how the presumption that a gift by a father to a son is an advance may be rebutted, so that there is a resulting trust to the father;[1] and as to when the executor's right to the undisposed-of residue can be rebutted, so that there is a resulting trust to the next-of-kin.[2] The case of *Garth v. Cotton*[3] is a leading case on the topic of constructive trusts; and one or two cases, which determined whether or not precatory words would create a trust, showed that precatory trusts were becoming a distinct variety of trusts.[4] The modern distinction between executed and executory trusts was well established; and, though Hardwicke in one case is reported to have said that all trusts were executory,[5] it is clear that he adhered to the established distinction.[6] He very clearly held that even a statute could not be made an instrument of fraud, so that if an executor and residuary legatee promised a testator to pay a legacy, and the testator on the faith of that promise had not inserted the legacy in the will, the executor could be compelled to pay it out of the testator's assets.[7] "If," he said,[8] "there is a declaration and undertaking by a legatee to do an act, in consideration of the testator's devising to that legatee, I know no case where the court has not decreed it, whether such undertaking was before the will has been made, or after."

Hardwicke's decisions made considerable additions to the law as to the powers, rights, and liabilities of the trustee. He must, as earlier cases had decided,[9] act gratuitously.[10] Though the court would interfere to compel him to fulfil his duties, it had no power to dictate to him as to the manner in which he should exercise a discretion which had been given to him;[11] and it had no power to vary the terms of the trust merely because it appeared likely that an event envisaged by the trust instrument would not occur.[12] A trustee was not an insurer; and therefore he was not liable if the trust property was lost

[1] Pole v. Pole (1747-1748) 1 Ves. Sen. 76; above 200.
[2] Blinkhorn v. Feast (1750) 2 Ves. Sen. 27; above 209, 212.
[3] (1753) 3 Atk. 751.
[4] Hill v. Bishop of London (1738) 1 Atk. at p. 620; Clifton v. Lombe (1751) Amb. 519; Massey v. Sherman (1739) Amb. 520.
[5] Hopkins v. Hopkins (1738) 1 Atk. at p. 594.
[6] Bagshaw v. Spencer (1743) 2 Atk. at p. 583.
[7] Reech v. Kennegal (1748) 1 Ves. Sen. 123 at p. 125.
[8] Drakeford v. Wilks (1747) 3 Atk. at p. 540.
[9] Above 211-212, 230.
[10] Ayliffe v. Murray (1740) 2 Atk. at p. 60.
[11] Gower v. Mainwaring (1750) 2 Ves. Sen. at p. 89.
[12] Anon. (1750) 2 Ves. Sen. 113; cp. Kirby v. Clayton (1750-1751) 2 Ves. Sen. 242.

without his negligence.[1] He could employ agents either if there was a legal necessity to employ them, or if there was a "moral necessity from the usage of mankind."[2] If, in the latter case, he was careful to employ skilled agents,[3] he was not liable if the property was lost by the default of the agents. If a trustee committed a breach of trust at the request and instigation of a beneficiary, he could not be made liable at the suit of that beneficiary.[4] The liability of two or more trustees for breach of trust to which they were all parties was joint and several.[5] It was this series of decisions as to the position of the trustee which constitutes Hardwicke's most important contribution to the law of trusts.

In one case Hardwicke stated the root principle of the rule as to the following of trust property.[6] But this was a case where money had been rightfully changed from one investment to another; and it would seem from another case that as yet that rule was not clearly grasped, nor was it applied to all the dealings by a trustee with the trust property, whether rightful or wrongful.[7] In the case of *Tomlinson v. Gill*[8] Hardwicke recognized that, though C, for whose benefit a contract was made between A and B, could not sue upon it at law, if the effect of the contract was to make B a trustee of the benefit of the contract for C, C could sue in equity to enforce the trust.

Family law. A very large proportion of these cases in which the law of trusts was elucidated and developed, arose out of family arrangements, which, if fair and reasonable, were favoured by equity;[9] and it was from the need to regulate the affairs of families and the activities of their members that many important bodies of equitable doctrine arose.

Before Hardwicke had induced the Legislature to pass his Marriage Act,[10] he had tried to remedy, as far as he could, some of the evils arising from the existing law. In the case of *Hill v. Turner*[11] an infant was made drunk at an alehouse near the Fleet

[1] Jones v. Lewis (1750-1751) 2 Ves. Sen. 240.

[2] *Ex parte* Belchier (1754) Amb. at p. 219; the instance given of a legal necessity is the case where one trustee joins in giving a receipt for money received by the other, see above 203; Knight v. Lord Plymouth (1747) 3 Atk. 480.

[3] Ibid. [4] Smith v. French (1741) 2 Atk. 243.

[5] Charitable Corporation v. Sutton (1742) 2 Atk. at p. 406.

[6] Waite v. Whorwood (1741) 2 Atk. 159.

[7] Cox v. Bateman (1750) 2 Ves. Sen. 19.

[8] (1756) Amb. 330: for this distinction see Gandy v. Gandy (1885) 30 C.D. at pp. 66-67, *per* Cotton L.J.

[9] "It was to save the honour of the father and his family, and was a reasonable agreement, and therefore if it is possible for a court of equity to decree a performance of it, it ought to be done," Stapilton v. Stapilton (1739) 1 Atk. at p. 5.

[10] Vol. xi 609.

[11] (1737) 1 Atk. 515; he said at the beginning of his judgment that "the misfortune is the want of a sufficient law to restrain such clandestine marriages," and that "it is incumbent on this court to prevent as far as they can, persons from profiting themselves by such infamous methods"; cp. More v. More (1741) 2 Atk. 157.

prison, and in that condition was married to a woman of bad character. The infant's mother sent him abroad, and the wife got an order for alimony from the ecclesiastical court. Hardwicke restrained her from proceeding on this order against the infant or his guardian ; and ordered her to consent that motion be made in the ecclesiastical court to absolve the infant and his guardian from sentences of excommunication awarded against them for non-compliance with the order to pay alimony. In another case, where the infant was a ward of court, on the application of her mother, he ordered that a suitor should not marry the lady without the leave of the court; and, as the suitor was also an infant, that his guardian do not permit him to marry her without such leave.[1] The court not only avoided marriage brocage contracts ; [2] it also went further and restrained agreements between the parties relative to their marriage, if those agreements amounted to a fraud on the parents of the parties.[3] How far settlors of property could impose conditions in restraint of marriage was much considered in the case of *Harvey v. Aston*,[4] in which the two chief justices and Comyns, J. were consulted. The rules on this matter were complex, because the rules of the ecclesiastical law, which were applied to testamentary gifts of personalty, differed from the rules of the common law, which were applied to devises of realty. It was not till 1788 that, in the case of *Scott v. Tyler*,[5] some definite rules were laid down on this matter.

In many cases Hardwicke relieved infants, or youthful heirs from the consequences of transactions into which they had been induced to enter. When a schoolboy had contracted a debt of £59 for wine, and the wine merchant had induced the boy to give a note for the amount after he had come of age, the court ordered the note to be cancelled ; [6] and in another case it was said that if a young heir was systematically imposed on, he was entitled to relief ; and, that if he had been induced to buy goods at extravagant prices, and had given a mortgage to secure the debt, the mortgage would only be valid for a sum which represented the fair price of the goods.[7] Similarly, if a person in necessitous circumstances sold his reversionary interest at a

[1] Smith v. Smith (1745) 3 Atk. 304 [2] Above 208, 217.

[3] Woodhouse v. Shepley (1742) 2 Atk. 535 ; the father of the lady had forbidden the match, and the parties had entered into bonds with a penalty to marry within thirteen months of his death ; Hardwicke said that it was a fraud on the father, who, thinking his daughter had submitted, makes a provision for her in that belief—" it is therefore in fraud of the father's right of disposing of his fortune among his children according to their deserts, and may be compared to cases of bonds given before marriage to return a part of the portion," ibid at p. 540.

[4] (1737) 1 Atk. 361. [5] 2 Bro. G.C. 431, S.C. 2 Dick. 712.

[6] Brooke v. Gally (1740) 2 Atk. 34.

[7] Berkley Freeman v. Bishop (1740) 2 Atk. 39.

gross undervalue, he could get relief.[1] This relief was given, said Hardwicke, " for the sake of the public, to prevent people's gaming, as it were, to the prejudice and damage of young improvident persons, and the heirs of families." [2] So, too, the court struggled against the device of selling annuities in order to evade the usury laws; [3] and, if possible, allowed the annuity to be redeemed on payment of the principal sum lent and legal interest.[4] On the other hand, the mere fact that a bargain was a hard bargain was no ground for relief, if the party was fully aware of what he was doing, and was neither defrauded nor unduly influenced; [5] and contracts made by infants which were for their benefit, and were acquiesced in after the attainment of majority, were upheld.[6] The court looked with suspicion upon transactions between guardians and wards, and trustees and their c.q. trusts; [7] and it set aside appointments which were frauds on powers.[8]

It is clear from Hardwicke's decisions that the principles applicable to the separate property of married women were being developed. Though an arrangement by which a woman settled her property on herself without the knowledge of her husband might be held to be void, because it was a fraud on his marital rights,[9] the consent of the husband was no longer necessary to such a settlement.[10] In fact, if a stranger gave a present to a married woman, the court would presume that the gift was to her separate use; [11] and if the husband gave property to his wife he was considered as holding it as a trustee for her separate use.[12] Moreover, any words which showed an intention that it should be the married woman's property were sufficient

[1] Barnardiston v. Lingood (1740) 2 Atk. 133.

[2] Ibid at p. 136. [3] For this device see vol. xi 604-606.

[4] Lawley v. Hooper (1745) 3 Atk. 278. Hardwicke said at p. 279 that " there has been a long struggle between the equity of this court and persons who have made it their endeavour to find out schemes to get exorbitant interest, and to evade the statutes of usury. The court . . . always determines upon the particular circumstances of each case; and wherever they have found the least tincture of fraud in any of these oppressive bargains, relief hath always been given."

[5] " It is not sufficient to set aside an agreement in this court, to suggest weakness and indiscretion in one of the parties who has engaged in it," Willis v. Jernegan (1741) 2 Atk. at p. 251.

[6] Smith v. Low (1739) 1 Atk. 489.

[7] Hylton v. Hylton (1754) 2 Ves. Sen. 547; at p. 549 Hardwicke said that " the principle of the court is of the same nature with relief in this court on the head of public utility, as in bonds obtained from young heirs, and rewards given to an attorney pending a cause, and marriage brocage bonds."

[8] Lane v. Page (1754) Amb. 233.

[9] Blanchet v. Foster (1741) 2 Ves. Sen. 264; but, as that case decided, if she had given a bond for a valuable consideration, the husband could get no relief; for the somewhat different ideas formerly held on this matter see vol. v 312-313; vol. vi 644. [10] For the older law see ibid 644-645.

[11] " This court of latter years have considered such a present as a gift to the separate use of the wife," Graham v. Londonderry (1746) 3 Atk. 393.

[12] Darley v. Darley (1746) 3 Atk. 399.

to create a separate use.[1] Even where the wife had quarrelled with her husband and had left him, she was held to be still entitled to the annuity which had been settled on her [2]—though it might be otherwise if she had eloped with an adulterer or had left her husband without any cause.[3] The wife had complete proprietary rights over her separate property. She could leave it by her will; and she could dispose of it *inter vivos* to her husband or anyone else.[4] The court, it is true, looked with some suspicion on gifts by a wife to a husband, and would set them aside if he had used any improper influence over his wife. But if no proof of such influence was apparent the gift was valid.[5] Some of these cases were beginning to make it obvious that the large powers of the married woman over her separate property, which were the logical consequences of the recognition of such property, might be so used by her, that she lost the benefit of the proprietary independence, which the institution of separate property was designed to secure for her. Since in most cases in which a husband has used undue influence to induce his wife to part with her property, it was difficult to get proof of the fact, the need for some such an institution as a restraint against anticipation was becoming apparent.[6]

Hardwicke laid down some fundamental principles as to the conditions under which the court would make a decree for *Specific Performance*. "The court," he said,[7]

[1] Darley v. Darley (1746) 3 Atk. 399; it was pointed out in Peacock v. Monk (1750-1751) 2 Ves. Sen. 190 that a married woman by agreement with her husband could hold her property to her separate use and dispose of it *inter vivos* or by will; but that such an agreement would not suffice in the case of real property; in the case of real property, if she wished to get a complete disposing power, it must be conveyed to trustees to her separate use and then to such persons as she should appoint by deed or will.

[2] Moore v. Moore (1737) 1 Atk. 272; in the seventeenth century the decision might have been different, see Whorewood v. Whorewood (1675) 1 Ch. Cas. 250, cited vol. vi 646 n. 10.

[3] "If the wife should elope, be guilty of adultery, or a criminal conversation, or should leave her husband without any cause . . . I shall think a husband right in his application to this court, to prevent her trustees from proceeding at law to recover her separate maintenance; but then the relief must arise from a very plain case, where there is a criminal conversation plainly proved, and plainly put in issue," Moore v. Moore (1737) 1 Atk. at p. 276; it was in this case that, on the attorney-general remarking that it was an uncommon case which would probably not occur again, Hardwicke said, "If you think so, you must have a very good opinion of the ladies; for

> In amore haec omnia insunt vitia, injuriae,
> Suspiciones, inimicitiae, induciae,
> Bellum, pax rursum."

[4] Willats v. Cay (1740) 2 Atk. 67—gift to a husband though he was insolvent; Hearle v. Greenbank (1749) 3 Atk. at p. 709.

[5] Grigby v. Cox (1750) 1 Ves. Sen. at p. 518; where there had been proposals for a settlement the court refused a request by the wife to pay her money to her husband, *Ex parte* Gardner (1755) 2 Ves. Sen. 671; but on this matter the practice of the court was not yet wholly settled, see n. 1 to that case.

[6] Below 324-326.

[7] Underwood v. Hitchcox (1749) 1 Ves. Sen. at pp. 279-280.

is not obliged to decree every agreement entered into, though for valuable consideration, in strictness of law; it depending on the circumstances. And undoubtedly every agreement of which there should be a specific performance, ought to be in writing, certain, and fair in all its parts, and for adequate consideration.

Thus inadequacy of consideration might be a ground for refusing it.[1] Time was not of the essence of a contract for the sale of land;[2] and the court would admit parol evidence to rectify a written agreement, and enforce the agreement as rectified, because such evidence was admissible on the part of the defendant to prove mistake or fraud.[3] But we have seen that some of Hardwicke's decisions still left it uncertain what contracts were specifically enforceable;[4] and, contrary to the rule established by the later cases, he assumed a power to give damages in a case where he had refused a decree for specific performance.[5] Similarly, although he gave a good definition of the kind of act which would be a good act of part performance—"it must be such an act done, as appears to the court would not have been done, unless on account of the agreement;"[6] and though he held that such acts as viewing the estate or giving directions for conveyance were not valid acts of part performance;[7] he followed the earlier cases, and held the erroneous view that payment of money was a sufficient act of part performance.[8] He held quite clearly that the justification of this doctrine was to be found in the fact that the object of the statute of Frauds was the prevention of fraud; so that its provisions could not be applied to a case where their application might promote fraud.[9]

On the topic of *Mortgages* Hardwicke's decisions did not add very much to the existing principles of equity; but some of them gave to those principles greater clarity and precision. He emphasized the principle that the mortgagor is in equity considered to be the owner of the land, and that his equity of

[1] Underwood v. Hitchcox (1749) 1 Ves. Sen. at pp. 279-280.

[2] Gibson v. Paterson (1737) 1 Atk. 12.

[3] Joynes v. Statham (1746) 3 Atk. 388; this view was approved by the court of Appeal in Craddock Bros. v. Hunt [1923] 2 Ch. 136, and by the Privy Council in United States v. Motor Trucks [1924] A.C. 196.

[4] Above 263 n. 3.

[5] City of London v. Nash (1747) 3 Atk. 512; Fry, Specific Performance (6th ed.) 600.

[6] Lacon v. Mertins (1743) 3 Atk. at p. 4.

[7] Clerk v. Wright (1737) 1 Atk. at p. 13.

[8] "Paying of money has been always held in this court as a part performance," Lacon v. Mertins (1743) 3 Atk. at p. 4.

[9] "Then there are other cases well known, taken out of the statute, not so much on the principle of no danger of perjury, as that the statute was not intended to create or protect fraud. As when agreements have been carried partly into execution. . . . In order that one side might not take advantage of the statute to be guilty of a fraud, the court would hold his conscience bound thereby," Attorney-General v. Day (1748-1749) 1 Ves. Sen. at p. 221.

redemption is an estate in the land, which "may be devised granted or entailed," [1] and of which a husband was entitled to an estate by the curtesy.[2] In the case of *Godfrey v. Watson* [3] he gave some account of the rights of a mortgagee in possession. He is not obliged to do more than keep the estate "in necessary repair," and he is not generally entitled to be paid for his trouble in collecting the rents; [4] but if he has spent money in defending the mortgagor's title he may add the money spent to the principal sum owing. In the case of *Toomes v. Conset* [5] he stated clearly and concisely why equity refused to allow any clog on the equity of redemption:

> The reason is, because it puts the borrower too much in the power of the lender, who, being distressed at the time, is too inclinable to submit to any terms proposed on the part of the lender.

We have seen that he gave the true historical explanation of the doctrine of tacking in the case of *Wortley v. Birkhead;* [6] and in the case of *Morret v. Paske* [7] he elaborated the conditions in which tacking was allowed. There must be a *bona-fide* purchase of the puisne incumbrance without notice of the intermediate incumbrances; [8] and the purchaser must purchase in his own right and not as a trustee.[9] He also explained why a judgment creditor, who is in possession by virtue of a writ of elegit, can tack his mortgage to the judgment debt; [10] and the reason why a bond debt cannot be tacked except as against the heir.[11] In the case of *Wortley v. Birkhead* [12] he made

[1] "An equity of redemption has always been considered as an estate in the land for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by a fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin," Casborne v. Scarfe (1737) 1 Atk. at p. 605; cp. R. W. Turner, the Equity of Redemption Chap. iv.

[2] Casborne v. Scarfe (1737) 1 Atk. 603. [3] (1747) 3 Atk. 517.

[4] Unless the "estate lies at such a distance from the place of his residence, as he must have employed a bailiff, if it had been his own," at p. 518; the principle is much the same as that applied to settle the question whether a trustee may employ agents, above 273.

[5] (1745) 3 Atk. 261; for the manner in which this rule has been adapted in modern times to a situation in which borrowers and lenders are economically on an equality, by distinguishing between stipulations which are invalid as clogs on the equity of redemption, and stipulations which are valid because they are collateral bargains which do not operate as a clog, see Holdsworth, Historical Introduction to the Land Law 258.

[6] (1754) 2 Ves. Sen. at p. 574; above 267. [7] (1740) 2 Atk. 52.

[8] At p. 53. [9] Ibid.

[10] "The reason why a mortgage may be tacked to a judgment is this, because the judgment creditor, by virtue of an elegit, may bring ejectment, and hold upon the extended value, and as he has the legal interest in the estate, the Court will not take it from him," ibid.

[11] "When a prior incumbrancer, by mortgage, judgment, or statute staple, has a bond likewise from the mortgagor, the mortgagor, in his life time, may redeem the mortgage etc. without paying off the bond debt; otherwise as to the heir-at-law, because the moment he redeems the estate, it shall be assets in his hands, and for this reason, the Court compels him to discharge the bonds, as well as the mortgage," ibid. [12] (1754) 2 Ves. Sen. 571.

it clear that the crucial time when the question whether or not a mortgagee seeking to tack had notice, was the time when he took his security, and not the time when he got in the prior incumbrance—" a man's having notice of a second incumbrance at the time of taking in the first does not hurt; it is the very occasion which shows the necessity of it." [1] The case of *Ex parte King* [2] shows that he considered the doctrine of consolidation to be " the established rule of the court."

Hardwicke's decisions on the subject of *The Administration of Assets* make it clear that, though the rules laid down by the ecclesiastical courts had some influence upon the interpretation of legacies of chattels,[3] those courts had ceased to influence the development of this branch of the law. The existence of a trust was sufficient to oust their jurisdiction; [4] and the pendency of a suit in the ecclesiastical court was not a sufficient ground for a demurrer to a bill in Chancery for the administration of the same estate.[5] In the case of *Hudson v. Hudson* [6] the differences in the legal position and powers of executors and administrators were explained; and in the case of *Wills v. Rich* [7] the powers of an executor before he had taken probate were defined. The rule that an executor to whom a legacy had been left was not entitled to undisposed-of residue was asserted; [8] but the application of this rule to the facts of particular cases sometimes gave rise to some very fine distinctions.[9] In the case of *Bainton v. Ward* [10] Hardwicke, following earlier cases,[11] held that property appointed under a general power was assets to satisfy the appointor's creditors. The reason, he said, was that a person who had such a power had to all intents and purposes a right of property; and " it would be a strange thing, if volunteers, as the legatees are, should run away with the whole, and that creditors for a valuable consideration should sit down by the loss without any relief in this court." [12]

It is clear that the court is coming to take the view that the distinction between legal and equitable assets turns upon the

[1] At p. 574.
[2] (1750) 1 Atk. 299-300.
[3] Above 259.
[4] Anon. (1738) 1 Atk. 491.
[5] Phipps v. Steward (1737) 1 Atk. 285; after citing precedents, Hardwicke said, " the reason for these cases is, that the ecclesiastical courts have no way of securing the effects in the meantime," ibid at p. 286.
[6] Ibid 460 at p. 461.
[7] (1742) 2 Atk. at pp. 285-286.
[8] Graydon v. Hicks (1739) 2 Atk. at p. 18.
[9] See the case of Newstead v. Johnston (1740) 2 Atk. 45 at p. 46 where a distinction was taken between a legacy and an exception out of a legacy.
[10] (1741) 2 Atk. 172.
[11] Above 194.
[12] At p. 172; in this case there is no distinct statement that the power must have been exercised, and Hardwicke said that if a man had power to dispose of a reversion in fee, " and makes no disposition of it, yet it shall be assets to satisfy specialty creditors "; but in this case the power had been exercised, and in Townshend v. Windham (1750) 2 Ves. Sen. at p. 9 the rule that the power must have been exercised is stated.

remedies open to the creditor to make the assets available to satisfy his claims—if he can make them available by an action at law they are legal assets : if he must have recourse to a suit in equity they are equitable assets.[1] But as yet this distinction is not very firmly grasped.[2] The rules as to the order in which different parts of an estate were liable to debts were becoming more precise. Hardwicke held that land descended was liable before land devised ; [3] and, after much consideration, he changed the opinion which he had formerly expressed, and held that the devisee of an estate subject to a mortgage debt was entitled to make the heir pay that debt, and so exonerate his estate. " I might at first," he said,[4] " be influenced by the appearance of hardship in this case on the part of the heir. But the rule of a court of equity in marshalling of assets is of great consequence to the practice of this court, and ought to countervail any argument of hardship to particular persons." In another case he repeated the principle that if one creditor or legatee had two funds to which he could resort, and another creditor or legatee had only one, and the first creditor or legatee exhausted the only fund to which the second could resort, the second creditor or legatee would to that extent be allowed to resort to the fund to which the first might have resorted.[5]

It was in one or two of Hardwicke's decisions,[6] and especially in the case of *Ward v. Turner*,[7] that we get the beginnings of the modern law as to *donationes mortis causa*. His judgment in that case showed that he was an accomplished Roman lawyer, who could adapt Roman principles,[8] and the principles applied in the ecclesiastical courts,[9] to the principles of English law as to the delivery of possession needed to pass the legal or equitable ownership in choses in possession and in action.[10]

Turning to the law of *Evidence*, we have seen that it was one of Hardwicke's decisions which recognized the rule that " the

[1] Plunket v. Penson (1742) 2 Atk. at pp. 293-294 ; the classic statement of the distinction was made by Kindersley V.C. in Cook v. Gregson (1856) 3 Drew. at p. 549.

[2] Thus it was held in Blatch v. Wilder (1738) 1 Atk. 420 that land devised to an executor to be sold was legal assets ; but this was not followed, Newton v. Bennet (1782) 1 Bro. C.C. 135 ; and the distinction drawn in Plunket v. Penson (1742) 2 Atk. at p. 293 as to whether the assets had been devised to the heir so that the descent was not broken, or to a stranger so that it was, was repudiated by Lord Eldon, Bailey v. Ekins (1802) 7 Ves. at p. 323.

[3] Palmer v. Mason (1737) 1 Atk. 505.

[4] Galton v. Hancock (1742) 2 Atk. 424 at p. 439.

[5] Reynish v. Martin (1746) 3 Atk. at pp. 335-336 ; above 203.

[6] Snellgrove v. Baily (1744) 3 Atk. 214—the delivery of a bond is a good *donatio mortis causa* as it passes the equitable interest ; Hassell v. Tynte (1756) Amb. 318.

[7] (1752) 2 Ves. Sen. 431. [8] At pp. 439-440. [9] At pp. 440-441.

[10] At pp. 441-443 ; Pollock and Wright, Possession 62-63, cite Hardwicke's words as the classic statement of the principle that a merely symbolic delivery of possession is not sufficient.

constant and established proceedings of this court are upon written evidence like the proceedings upon the civil or canon law." [1] It is clear from his decisions that, though the rules of the law of evidence were in some respects the same in equity as they were at law—e.g. some of the rules as to the qualifications of witnesses,[2] and the rule that an oath could be administered to a witness in the form that was binding upon his conscience,[3]—they differed in many material respects. Thus a person made defendant for the sake of form,[4] or a trustee when he was only a nominal defendant,[5] could be a witness; and in cases where fraud was charged, or where the question at issue was the existence or terms of a trust,[6] the strict common law rules were not followed. On the other hand, Hardwicke finally decided that equity must follow the law in refusing, except in the case of equivocation, to allow parol evidence to explain the intention of a testator.[7] But equity in this matter went beyond the law in admitting such evidence, not only in the case of equivocation, but also to rebut an equitable presumption.[8] The rule that, if a discovery might expose the person against whom discovery was sought to a penalty, discovery must be refused, was adhered to in several cases, which turned upon the statute of 1698-1699 [9] which disabled papists from purchasing land. It was held that if the predecessor in title of the person from whom discovery was sought could have objected on the ground that the discovery might expose him to a forfeiture, the present holder of the property could equally object.[10] The court in several cases admitted parol evidence of mistake in order to rectify a written instrument; [11] but it insisted that in such cases there must be conclusive evidence that a mistake had been made.[12]

(iv) *The province of equity.* We have seen that in Hardwicke's time, and long afterwards, questions arising under the law of bankruptcy were an important part of the business of the

[1] Graves v. Eustace Budgel (1737) 1 Atk. at p. 445, cited vol. ix 354.
[2] Manning v. Lechmere (1737) 1 Atk. 453.
[3] Omychund v. Barker (1744) 1 Atk. 21.
[4] Man v. Ward (1741) 2 Atk. at p. 229. [5] Ibid.
[6] "I would not have it understood, as if I laid it down, that rules of evidence at law and in equity, differ in general; but only in particular cases, when fraud is charged by a bill, or in cases of trusts, this court does not confine itself within such strict rules as they do at law, but, for the sake of justice and equity, will enter into the merits of the case, in order to come at fraud, or to know the true and real intention of a trust or use declared under deeds," ibid.
[7] Ulrick v. Litchfield (1742) 2 Atk. 372; for the rule in cases of equivocation see vol. ix 220-221.
[8] Ulrick v. Litchfield (1742) 2 Atk. at p. 373; Lake v. Lake (1751) Amb. 126.
[9] 11 William III c. 4 § 4; vol. vi 201.
[10] Smith v. Read (1736-1737) 1 Atk. 526; Harrison v. Southcote (1751) 1 Atk. 528 at p. 539; cp. Boteler v. Marmaduke (1746) 3 Atk. at p. 457.
[11] Simpson v. Vaughan (1739) 2 Atk. 31; Baker v. Paine (1750) 1 Ves. Sen. 456.
[12] Henkle v. Royal Exchange Assurance Co. (1749) 1 Ves. Sen. at p. 319.

court.[1] One of the most important of these cases was the case of *Ryall v. Rowles*.[2] The case turned upon the order and disposition clause in the bankruptcy Act of James I's reign; and Hardwicke took the opportunity to give a valuable exposition of the policy of the Legislature in framing the order and disposition clauses contained in this Act.[3] During this period many commercial questions came before the court of Chancery. But the procedure of the court was not well adapted to the trial of these questions; and Hardwicke cannot be said to have made any very important contribution to the development of commercial law. He decided, not so much on principle, as on the evidence as to the commercial custom supplied by the merchants;[4] and it was this absolute dependence on commercial custom, as explained to him by the evidence of merchants, which led him, in an opinion which he gave as attorney-general,[5] and in the case of *Pearne v. Lisle*,[6] to assert that English law recognized a right of property in negro slaves. Buller, J.'s statement that "all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle,"[7] describes the system that Hardwicke pursued. In the case of *Snee v. Prescot*[8] he proceeded, as Buller, J., said, with great caution, he did not establish any general principle, but decreed on all the circumstances of the case put together.[9] Nevertheless some of his decisions in commercial cases do lay down important principles. He followed earlier decisions in recognizing the right of an unpaid vendor to stop *in transitu*

[1] Vol. i 470-472; vol. viii 241-244.

[2] (1749-1750) 1 Ves. Sen. 348; the Chancellor was assisted by Lee C.J., Parke C.B., and Burnet J.

[3] He said, at p. 372: "I go on four general principles in the construction of this Act. First, the aim and intent of the Legislature was, that an equal proportion of the effects of the bankrupt among his creditors should be attained as far as possible. Secondly, that to attain that end these Acts of Parliament should be construed beneficially for the general creditors under the commission. Thirdly, it appears, the general view and intent of the provision, now under consideration, was to prevent traders from gaining a delusive credit by a false appearance of substance to mislead those who should deal with them. Fourthly, the Legislature judged they might do this by subjecting all the goods of the bankrupt, though conveyed to others, to the general creditors under the commission."

[4] See Cornwal v. Wilson (1750) 1 Ves. Sen. at p. 510; Ekins v. Macklish (1753) Amb. at p. 186; Kruger v. Wilcox (1755) Amb. at p. 253; in Doddington v. Hallet (1750) 1 Ves. Sen. at p. 499 Hardwicke said, "the defendant's counsel have been forced to resort to the case of an assignment of a share [in a ship] for a valuable consideration; which not being the case, I will not now determine; because that is to be governed by the course of trade."

[5] Sommersett's Case (1771) 20 S.T. at p. 81.

[6] (1749) Amb. at pp. 76-77; vol. iii 508.

[7] Lickbarrow v. Mason (1787) 2 T.R. at p. 73.

[8] (1743) 1 Atk. 245.

[9] Lickbarrow v. Mason (1787) 2 T.R. at p. 73; he said also, "Lord Hardwicke has with his usual caution, enumerated every circumstance which existed in the case: and indeed he has been so particular, that if the printed note of it be accurate, which I doubt, it is not an authority for any case which is not precisely similar to it."

as against a bankrupt consignee [1]—though the limitation of that right to the consignee, and its denial to his assignee, were not recognized till the decision in *Lickbarrow v. Mason* [2] many years later. Both the right and its limitation testify to the early connection of commercial law with equity; for the right itself depends on the maxim that he who comes to equity must do equity,[3] and the limitation of the right, on the maxim that where the equities are equal the law must prevail.[4] The case of *Lake v. Hayes* decided that every indorser of a bill of exchange was liable as a new drawer, so that no demand need first be made on the original drawer; [5] and the case of *Powell v. Monnier* [6] that a bill of exchange can be accepted verbally or by letter. In the case of *The Sadlers Co. v. Badock* [7] Hardwicke held that an insurer against fire must have an interest in the property both when the policy is taken out and when the fire happens. In *Ex parte Hunter* [8] he asserted and applied the principle that, in the case of an insolvent firm, when there is a joint estate of the firm and separate estates of the partners, the joint estate must first be applied to the satisfaction of the firm debts, and the separate estates to the separate debts of the partners.

Besides cases in bankruptcy, which were a considerable part of the business of the court, and commercial cases which were not very infrequent, one or two cases of copyright are reported.[9] In the most famous of these cases—the case of *Pope v. Curl* [10]—the rule was established that the copyright in a letter belongs to the writer, and that therefore the receiver cannot publish it without his consent. But it is clear from the case of *Blanchard v. Hill* [11] that the law as to trade marks was as yet in its infancy.

[1] Snee v. Prescot (1743) 1 Atk. 245; Wiseman v. Vandeputt (1690) 2 Vern. 203; vol. viii 243.

[2] (1787) 2 T.R. 63 (1794) 5 T.R. 683; for the chequered history of this case see below 491-492.

[3] Snee v. Prescot (1743) 1 Atk. at p. 248.

[4] Buller J. said: "In a very able judgment delivered by my brother Ashhurst in *Lempriere v. Pasley* in 1788, 2 T.R. 485, he laid it down as a clear principle, that, as between a person who has an equitable lien and a third person who purchases a thing for valuable consideration and without notice, the prior equitable lien shall not over-reach the title of the vendee. This is founded on a plain and obvious reason: for he who has bought a thing for a fair and valuable consideration, and without notice of any right or claim by any other person, instead of having equity against him has equity in his favour; and if he have law and equity both with him he cannot be beat by a man who has equal equity only," (1793) 6 East 20 *note*.

[5] (1736) 1 Atk. 281. [6] (1737) 1 Atk. 611. [7] (1743) 2 Atk. 554.

[8] (1742) 1 Atk. 223 at pp. 227-228; vol. viii 242-243.

[9] Blackwell v. Harper (1740) 2 Atk. 93—copyright in engravings; Gyles v. Wilcox (1740) 2 Atk. 141—an allegation that a book called Modern Crown Law was a mere copy of Hale's Pleas of the Crown; the books were ordered to be compared and the result reported to the court, ibid at p. 144.

[10] (1741) 2 Atk. 342.

[11] (1742) 2 Atk. 484; Schechter, Historical Foundations of the Law relating to Trade Marks 134-137; vol. viii 430; Street, Foundations of Legal Liability, i 418-419.

It is true that in that case the plaintiff relied on a charter which Hardwicke held was illegal because it established a monopoly; but even if he had not relied on an illegal charter, Hardwicke held that, in the absence of fraud, no injunction could be granted to restrain one trader from using the same mark as another trader. In the case of *Gage v. Bulkeley*[1] he dealt with the question of the effect to be given to a foreign judgment, and the manner in which a litigant could make use of it in an English court. Occasionally odd cases, which are reminiscent of old law, appear.[2] But generally it would be true to say that Hardwicke's decisions show that the province of equity is determined almost in its final form.

None of Hardwicke's decisions were ever reversed, and only three were appealed against. Montesquieu said that this fact was "un éloge audessus de toute la flatterie."[3] It is not quite that, for Hardwicke was the only peer in the House of Lords who was a lawyer, so that an appeal to the House of Lords was an appeal to himself. On the other hand, it should be remembered that the convention that only lawyers took part in the judicial business of the House was not yet completely established.[4] It is true that some of his decisions have not been followed by his successors.[5] But these are very few by comparison with the immense number of his decisions which have been accepted as the foundation of the principles and rules of modern equity—as few as the cases in which Coke's rulings have been disapproved by later lawyers;[6] so that, just as Coke laid the foundations and erected some part of the edifice of the modern common law, so Hardwicke laid the foundations and erected a large part of the edifice of modern equity. We shall see that his successors added to this edifice, and settled a question which was not completely settled during his tenure of office—the relation of the modern system of equity to the law;[7] and that then, when

[1] Ridg. t. Hard. 263; Lord Kenyon C.J. said, ibid 277 n., that, "after this judgment everything else is waste paper. I remember when Judge Wilmot opposed the *obiter dicta* of Sir Jos. Jekyll to the judgment of Lord Hardwicke, Lord Camden supported the latter and said that one solemn determination of Lord Hardwicke was worth one hundred dicta of any other judge."

[2] In Sir Henry Blount's Case (1737) 1 Atk. 295 there was an application for a commission to delegates to determine an appeal from a ruling of the court of Chivalry (vol. i 578-579) in proceedings for usurping armorial bearings; in Shepherd v. Cotton (1747) 1 Ves. Sen. 38 a bill was brought by a member of Parliament, claiming that a certain estate was charged with the payment of wages for the knights of the shire of Cambridgeshire, and asking for payment; a demurrer to the bill on the ground that the plaintiff's remedy was at common law was upheld.

[3] Cited P. C. Yorke, Life of Lord Hardwicke ii 481.

[4] Ibid ii 478-479; vol. i 376-377; vol. x 609-610.

[5] Above 277; Blatch v. Wilder (1738) 1 Atk. 420 n. 1; Adams v. Gale (1740) 2 Atk. 106; Lacon v. Mertins (1743) 3 Atk. at p. 4; Wilson v. Harman (1755) Amb. 279; Doddington v. Hallet (1750) 1 Ves. Sen. 497.

[6] Vol. v. 477.

[7] Below 583-605.

this question had been settled, a great Chancellor, though not so great as Hardwicke, during his even longer tenure of office, completed the form of the edifice, and so settled the sphere within which later and comparatively minor developments have been made. Eldon's work was the complement of Hardwicke's, so that it can truly be said that these two great eighteenth-century lawyers are the makers of our modern system of equity. And so in the sphere of equity, as in many other legal spheres, the eighteenth century was a great creative century, which fixed the conditions in which the lawyers of the following century did their work of adapting the law to the new needs of a rapidly changing society.

We must now turn from Hardwicke's great and permanent work in the sphere of the substantive principles of equity, to his less satisfactory work in the sphere of its adjective rules. We shall see that the fact that it was less satisfactory has had results upon the later development of equity and its relations to the law, which have been as permanent as the other and more satisfactory part of his work.

Hardwicke's attempts to arrest the deterioration of the procedure and practice of his court.

In earlier volumes of this History I have given some account of the main defects of the system of equity procedure and pleading.[1] Some of these defects were old-standing defects, which were aggravated during the eighteenth century by the increase in the business of the court, and by the failure of either the Legislature or the Chancellors to exercise adequate supervision over its officials. Others were developed by the growth in the precision and technicality of the rules of pleading, which was the necessary consequence of the growing precision and elaboration of the principles of equity.[2] We have seen that these defects were due mainly to the following causes: First, the manner in which many of these officials were recruited was mediæval. Some of the offices were patent offices, the holders of which drew large revenues from the fees paid by the suitors, whilst the work was done by poorly paid deputies.[3] Other offices were filled by persons who drew large fees from the suitors for work not very adequately performed,[4] or for services or for copies of documents which were unnecessary.[5] The clerks in these offices, who generally did the greater part of the work, were, as in other government offices, employed by the head of the office;[6] and

[1] Vol. i 423-442; vol. ix 335-406.
[2] Ibid 376-406.
[3] Vol. i 424-425, 441.
[4] Ibid 440.
[5] Ibid 426, 441.
[6] Vol. x 510-511.

they often tried, not unsuccessfully, to extract new fees from the suitors.[1] These characteristics were common to the official staffs of the courts of law and the court of Chancery ; [2] but we have seen that they produced worse consequences in the court of Chancery than in the courts of law, by reason of the peculiar characteristics of the Chancery procedure and pleading, and of the administrative character of its business.[3] Secondly, the fact that a cumbersome and irrational system of pleading was being developed on strictly logical lines ; [4] the fact that all the evidence in Chancery proceedings was written evidence obtained and presented to the court in a particularly ineffective way ; [5] the fact that the court set out, not to try issues between the parties, but to do complete justice as between many persons ; [6] and the fact that, in order to do this complete justice, it was necessary to take accounts to make inquiries and to administer estates [7]— aggravated the evil effects of the employment of a staff recruited and paid by mediæval methods. Thirdly, the judicial staff of the court of Chancery was inadequate. As compared with the courts of common law, the court of Chancery was understaffed ; and that meant that the Chancellor and the Master of the Rolls had no time to supervise adequately the doings of the officials of the court.[8] Therefore all the abuses which followed from the two first-mentioned causes were able to increase and multiply. These were the reasons why the system of equity procedure and pleading deteriorated throughout the eighteenth century. It is, I think, the one defect in Hardwicke's otherwise admirable achievement—a defect which is even more apparent in the achievements of all the other Chancellors of this century—that he made no effective attempt to arrest this deterioration.

The main defects in the procedure and practice of the court had been pointed out in the seventeenth century ; [9] and some abortive attempts had been made to induce the Legislature to remedy some of them immediately after the Revolution.[10] The scandals connected with the manner in which the Masters had dealt with the suitors' money, and with the manner in which the Chancellor had profited by the sale of the office of Master, had called renewed attention to the state of the official staff of the court.[11] In 1729 an enquiry into the fees and emoluments of the officers of the courts had been set on foot by the House of

[1] Vol. i 427, 441 ; below 287.
[2] Vol. i 424-425 ; vol. ix 371-372 ; for the official staffs of the common law courts see vol. i 246-262.
[3] Ibid 426 ; vol. ix 373-375.
[4] Ibid 393.
[5] Ibid 354-358.
[6] Ibid 348.
[7] Ibid.
[8] Vol. i 423-424, 437 ; vol. ix 373-374.
[9] Ibid 423-428.
[10] Vol. i 435-436.
[11] Above 204-206 ; vol. i 436.

Commons.[1] In 1733 the information elicited by this enquiry was referred to a committee ; [2] and that committee

> thought it necessary to examine into the fees of each court separately, and to begin with the court of Chancery, which is a court always open, and which exercises the most extensive jurisdiction, and abounds with clerks and officers.[3]

It reported that since 1598, when a presentment as to the officers of the court had been made, very many new offices had been created.[4] It was true that the abolition of the court of Star Chamber and of the court of Wards and Liveries had extinguished some offices, and had reduced the profit of others. But so many new officers had been created that it was difficult to get a complete list of them, and still more difficult to discover what fees they charged, and upon what authority these charges were made.[5] But it was clear that changes in the practice of the court had greatly increased the profits of those officers who were " concerned in the proceedings in equity, by the multiplying of petitions, bills, answers, pleadings, examinations, decrees, and other forms, and copies of them, and extending them frequently to an unnecessary length." [6] It was clear that suitors were charged large sums for unnecessary copies, and that unnecessary and futile summonses were taken out to attend the masters for which the suitors paid.[7] The committee resolved that the fees of all the officers ought to be fixed, established, and open to inspection ; [8] and it recorded its opinion that

> the interest which a great number of officers and clerks have in the proceedings in the court of Chancery, has been a principal cause of extending bills, answers, pleadings, examinations, and other forms, and copies of them, to an unnecessary length, to the great delay of justice, and the oppression of the subject.[9]

The report of this committee had called attention to some of the defects in the practice and procedure of the court—the unregulated growth of its staff, the arbitrary power assumed by many members of that staff to charge fees, the abuse of compelling suitors to pay for useless copies, and the consequent interest of members of the staff in increasing the length and elaboration of the documents to be copied. In consequence of this report the House addressed the King to set on foot a survey

[1] Parkes, History of the Court of Chancery 305.
[2] Parlt. Hist. viii 1071-1072; the report of this committee is printed, ibid 1072-1075, and by Parkes, op. cit. 306-311.
[3] Parlt. Hist. viii 1072.
[4] Ibid 1072-1073.
[5] Ibid 1073, 1074.
[6] Ibid 1073.
[7] Ibid 1073-1074; the abuses of these futile summonses to appear before the Masters for which the suitors paid, remained unreformed, see vol. i 426; vol. ix 360.
[8] Parlt. Hist. viii 1075.
[9] Ibid.

of the officials of the courts, and of the fees which they charged.[1] The report of the commission on the court of Chancery, which was signed by Hardwicke, gave a complete list of the officers of the court, and of the fees charged by them.[2] It recommended that lists of the allowed fees should be exhibited in all the offices of the court; that a speedy procedure against officers who attempted to exact greater fees should be introduced; [3] "that no expedition money be demanded or taken on any pretence whatsoever"; "that no office belonging to the court, or concerning the administration of justice therein be for the future allowed to be bought or sold"; [4] and that the execution of offices by deputy and the increase in the number of offices should be prohibited. It recommended that the cost of copies should be reduced; but it abstained from making any specific recommendation as to the means by which these reforms were to be accomplished; and it added that for some of the changes proposed legislative authority was needed.[5] Hardwicke acted on this report by issuing in 1743 a long order which regulated the fees to be taken by the officers of the court,[6] and in some cases prescribed the forms in which documents were to be drawn up.[7] This order was to "be observed and performed until some further or other regulations or provisions shall be lawfully made touching the premises respectively." [8] In fact no other general order of the court as to these matters was made during this period; [9] and, at the beginning of the nineteenth century, there was still some uncertainty as to the amount of the fees chargeable, and as to the authority by virtue of which they were charged.[10]

[1] Parlt. Hist. viii 1077; Parkes, History of the Court of Chancery 311-312.

[2] The report is printed in Parlt. Papers 1814-1815 vol. xi; their findings and recommendations are printed by Parkes, op. cit. 313-317.

[3] "The present method, by indicting the officers for extortion, being found by long experience to be wholly ineffectual."

[4] "The sale of offices being as they apprehended, one of the principal causes of the increase of fees; the purchasers generally finding themselves under the strongest temptations, by all ways and means to increase their profits (which must be at the expense of the suitors) in order to make their offices worth the money they pay for them; and when the offices are held for life only or other uncertain estates the temptation is still the stronger, as the hazard is greater."

[5] "And as to the residue of the matters therein proposed, we think they well deserve to be considered, and that many parts thereof may be very beneficial to the suitors; but divers of them appear to us to be of such a nature as can be only effectually established by the authority of Parliament."

[6] The order is printed by Sanders, Orders of the High Court of Chancery i Pt. ii 559-619. [7] Ibid 562-563, 567-568. [8] Ibid 560.

[9] Hardwicke's orders (besides those of a purely personal character which deal with misdeeds of clerks and officials, as to which see Sanders, op. cit. i Pt. i 544, 545, 553; Pt. ii 619, 623, 624) deal with the accountant-general's office, ibid i Pt. i 549; The suitors' money, ibid 556; supplemental bills and bills of review, ibid 557; costs on the dismissal of a bill, ibid i Pt. ii 628; the signing of answers and pleas, ibid 629; the sixpenny writ office, ibid 629, 633.

[10] See Parlt. Papers 1810-1811 iii 933—as to the apportionment of the fees collected by the secretary of bankrupts, 937—as to the fees payable to the deputy clerk of the Crown.

Parliament had called attention to some, but to some only, of the abuses of the practice and procedure of the court. It had concentrated its attention on the unregulated growth of its official staff, on the uncertain and extortionate fees which the members of that staff exacted from the suitors, and on the abuses arising from the compulsion upon the suitors to pay for useless copies of unduly lengthy documents. But it had not called attention to the main causes for the unsatisfactory condition of the practice and procedure of the court. No attention was called to the inadequacy of the judicial strength of the court.[1] No attention was called to its futile method of taking evidence,[2] to its cumbersome process to compel appearance or to compel obedience to a decree,[3] or to the growing technicality of its system of pleading.[4] No proposal was made to abolish the vicious system of compelling suitors to pay for office copies,[5] or the expensive fiction that the suitor must be represented by a clerk in court ;[6] and though one of the abuses of the procedure in the masters' offices was alluded to,[7] no attempt was made to remedy the delay and expense of the procedure in those offices.[8] That these causes were operating, both before and during Hardwicke's tenure of office to produce the evils of which Parliament and other critics of the court complained, is obvious. It is true that these evils had not become quite so glaring as they became at the end of this and at the beginning of the following century. But it is clear from some of the cases reported during Hardwicke's tenure of office that they were producing undue delay and therefore undue expense. Let us look at one or two instances.

In 1738 an appeal was made from a decree made by the Master of the Rolls in 1734 ; and after the appeal had been decided in 1738, further matters were left over, on which the master was to make his report.[9] It is significant that both Jekyll, M.R., and Hardwicke held that the dependency of a bill in Chancery for nearly six years, was not such a demand as would exempt a debt from the operation of the statute of limitations.[10] In the leading

[1] Vol. i 439 ; above 286.
[2] Vol. ix 354-358.
[3] Ibid 352-353 ; cp. below 292-293.
[4] Vol. ix 390-406.
[5] Above 287.
[6] Vol. ix 369-370.
[7] Above 287.
[8] Vol. ix 360-365 ; it was notorious in the eighteenth century, as it was at the beginning of the following century, that the delay and expense of this procedure was one of the worst abuses of the court ; in a debate in the House of Lords in 1743 it was said that " in private causes the length of time before the masters is a great hardship," Parlt. Hist. xii 1190 n. ; in 1780, in a debate on the public accounts, Dunning alluded to " the characteristic delay " of the masters—" appealing to the House whether most of the gentlemen present could not feelingly witness the tediousness of the processes in Chancery," Parlt. Hist. xxi 558.
[9] Russel v. Hammond (1738) 1 Atk. at pp. 14, 17.
[10] Lake v. Hayes (1736) 1 Atk. at p. 282 ; Anon. (1736) 2 Atk. 1.

case of *Chesterfield v. Janssen*[1] the proceedings were begun in 1746, and the final decree was not made till 1750; and then there were further proceedings before the master to take an account of what was due on the bond given by the plaintiff's testator.[2] The case of *Sheffield v. Duchess of Buckinghamshire*,[3] which came before the court in 1739, shows how the forms of the court of Chancery and the ecclesiastical courts could be made use of by determined litigants. Hardwicke, in granting a perpetual injunction to prevent the Duchess from suing in the prerogative court, said :[4]

> If I was not to grant this injunction, many inconveniences must necessarily arise to the parties; the will was made in 1716, and proved with the privity of the Duchess in 1721; the decree [for the administration of the estate] was in the same year, vast sums laid out, and an acquiescence of all parties; the decree affirmed in the House of Lords in 1737; then a new suit in the ecclesiastical court to dispute the will on the same facts on which the precedent determinations were had, two witnesses are dead, who possibly if living, might establish the will; if this was suffered property would never be safe.

That it was possible for a plaintiff to bring a bill, and keep the proceedings hanging on for years, is shown by a case where a bill was brought in 1729, and not brought to a hearing till 1742.[5] In the case of *Galton v. Hancock* the bill was brought in 1737, and the decree to account before the master was not made till 1742.[6] In the case of *Dormer v. Fortescue* the proceedings at law and in equity lasted from 1731 to 1744, and then accounts were to be taken, and a question as to the right to the deeds was reserved till the right to the inheritance had been finally determined.[7] In the case of *Buxton v. Lister* the fact that the remedy at law was much more expeditious than the remedy in equity, was given as one reason why the court could not as a rule specifically enforce "contracts which relate to merchandize."[8] In the case of *Lethieullier v. Tracy* it appears that a decree had been made in 1728 to carry the trusts of a will into execution, and that it was not till 1752 that the master had settled the conveyance.[9] After the master's report exceptions to it were heard in December, 1753, and April, 1754,[10] when an exception was allowed, and the case went back to the master.[11] In the case of *Ryall v. Rowles* the bankruptcy occurred in 1740, the case was heard by the Chancellor in 1747, it was reargued before the Chancellor and the judges in 1748, and it came on

[1] (1750) 1 Atk. 301.
[2] Ibid at p. 355.
[3] (1739) 1 Atk. 628
[4] Ibid at p. 631.
[5] Lockwood v. Ewer (1742) 2 Atk. 303.
[6] Ibid 424, 427.
[7] (1744) 3 Atk. at pp. 125, 134.
[8] (1746) 3 Atk. at p. 384.
[9] (1754) 3 Atk. at p. 776.
[10] Ibid 774, 784.
[11] Ibid at p. 797.

again for further directions in 1750.[1] In the case of *Burgess v. Wheate* [2] the proceedings dragged on from 1739 to 1759.

It is true that in some of these cases the delay may have been due to the neglect of the parties to prosecute their suit.[3] But in very many of them it must have been due to the forms of the court—to such causes as the dilatory procedure in the masters' offices, the manner in which the evidence was taken, the need to file supplemental bills or bills of revivor, and sometimes the unsatisfactory character of process to enforce appearance or to enforce obedience to a decree.[4] Hardwicke must have known, better than anyone else, of the existence of these defects in the procedure and practice of his court; [5] and he was the person best fitted to devise some measure of legislative reform, and the only person who would have had the slightest chance of carrying such a measure of reform. It is unfortunate that he made no attempt to initiate and carry such a measure; for the result was that the procedure of the court went on deteriorating, with the dire results portrayed by the evidence published by the Chancery Commissioners in 1826. That he made no attempt to initiate reforms is due, first, to the difficulty of carrying them; secondly, to his aversion to change unless he was quite clear that it was a change for the better; and, thirdly, to the fact that he was always overworked.

(i) It would have been very difficult to make any change in the system by which officials were paid by fees earned partly by themselves and partly by deputies paid by themselves. An attempt to reform this system would have been regarded as an attack on property,[6] and would have aroused an opposition from all those many persons employed by the government who were remunerated in this way. The difficulties which Burke found in carrying his measure of economic reform [7] make it clear that

[1] (1749-1750) 1 Ves. Sen. at pp. 349, 375; for other cases in which the proceedings extended over a long period see Norris v. Le Neve (1743) 3 Atk. 26, where the proceedings began in 1740, and there was an appeal to the House of Lords which was dismissed in 1744; in Mead v. Lord Orrery (1745) 3 Atk. at p. 236 mention is made of a case where the decree was made in 1715 and the master reported in 1731; in Steadman v. Palling (1746) 3 Atk. 423 the proceedings lasted from 1742-1746, and then the case was referred to the master to report; in Harvey v. Ashley (1748) 3 Atk. 607 the proceedings were begun in 1745; in Goring v. Nash (1744) 3 Atk. at p. 187 it is stated that the case was referred to the master in 1742, and that it did not come again to the court for further directions till 1744.

[2] (1759) 1 Eden 177.

[3] See Glynn v. Bank of England (1750) 2 Ves. Sen. at pp. 38-39.

[4] Wharam v. Broughton (1748) 1 Ves. Sen. 180; below 292-293.

[5] It is curious that, though he considered the mode of taking evidence in the ecclesiastical courts by paper depositions, was inferior to the mode of taking evidence *viva voce* in the common law courts, see Montgomery v. Clerk (1742) 2 Atk. at p. 379, Barnesly v. Powel (1749) 1 Ves. Sen. at p. 287, he never seems to have realized that the mode of taking evidence in the court of Chancery was less efficacious than that adopted in the ecclesiastical courts, below 680, 682.

[6] See vol. i 247, 249-250, 259-260.

[7] Vol. x 521-522, 524.

Hardwicke would most probably have failed if he had attempted to make reforms of this kind. The same opposition would have been raised to any other reform in the procedure of the court, and for the same reason. A reform in the procedure of the Masters' offices, in the Six Clerks' office, in the manner of taking evidence, or in any other part of the machinery of the court, would have meant a diminution in the fees payable upon taking the prescribed steps in a suit. The difficulty of reconciling all these vested interests would have been great—probably insuperable. And yet not quite insuperable; for it is clear from the manner in which Parliament had made new provisions for the security of the suitors' money in 1725 that it could be got to act;[1] and in 1732 an Act had been passed to make more effectual the process of the court against persons who evaded service or who refused to appear.[2] But probably it is true to say that something in the nature of a public scandal was necessary to induce it to act effectively. No doubt Hardwicke realized this; and he was the more ready to realize it because there would have been much technical difficulty in devising a workable measure of reform; and he was averse from changing a system which worked, except for one which he was sure would work better.[3]

(ii) Hardwicke's point of view on this matter is illustrated by a speech which he made in a debate in the House of Lords in 1740 on the state of the army. He said:[4]

> It is dangerous, my lords, to admit any alteration which is not absolutely necessary, for one innovation makes way for another. The parts of a constitution, like a complicated machine, are fitted to each other, nor can one be changed without changing that which corresponds to it. This necessity is not always foreseen, but when discovered by experience, is generally complied with; for every man is more inclined to hazard further changes, than to confess himself mistaken by retracting his scheme. Thus, my lords, one change introduces another, till the original constitution is entirely destroyed.

That Hardwicke approached the complicated machinery of his court from this point of view is clear from the case of *Wharam v. Broughton*.[5] The plaintiff had got a decree against a defendant for the payment of a sum of money. The defendant had stood out all the process taken against him, and had left the kingdom. His goods and a leasehold estate belonging to him had been sequestered. But this decree had neither been signed nor enrolled. While these proceedings were going on the plaintiff died; and the question was whether his widow and executrix must file a bill of revivor to keep up the sequestration, or whether

[1] Above 213. [2] 5 George II c. 25; below 293 n. 4.
[3] Above 249-250. [4] Parlt. Hist. xi 921. [5] (1748) 1 Ves. Sen. 180.

this somewhat lengthy process could be dispensed with. Hardwicke held that it could not—though he said that he did not wonder that in the circumstances "the representative of the plaintiff struggles to have the most expeditious proceeding, and to prevent further delay by the forms of the court," [1] and that he would do all he could to help her, "consistent with the rules of the court." [2] A bill of revivor was held to be necessary, since the decree had not been signed and enrolled; [3] but it was held also that even a bill of revivor would not have been sufficient in the circumstances, in spite of the argument that "the court should not be so bound by its forms as not to come at justice," and in spite of Hardwicke's wish to help the plaintiff, if evidence had not been produced that the defendant had been within the kingdom within the last two years.[4]

(iii) As a leading member of the government, as Speaker in the House of Lords, and as the sole peer who was a professional lawyer, Hardwicke was over burdened with both political and judicial work.[5] In addition to all this he gave, as we shall see,[6] long hours to the work of the court of Chancery. In these circumstances we cannot blame him for not attempting a measure of reform which it would have been difficult, if not impossible, to carry out.

These were the reasons why Hardwicke did not attempt to induce the Legislature to make any extensive reforms in the practice and procedure of his court. He knew that evils existed; but he thought (probably rightly) that it would be impossible, in the face of the vested interests of the officials, to induce it to make any effective reform; and he probably considered that a reform which merely tinkered with the existing evils would have caused more harm than it cured. These are good and valid reasons for his inaction. But it is nevertheless regrettable that he took no action; for the deterioration in the practice and procedure of the court was not so marked as it afterwards became; and he was the only Chancellor of the century who had the technical skill and the authority sufficient to initiate such a reform with any prospect of success. But he was not indifferent to the defects in the practice and procedure of his

[1] At p. 181. [2] Ibid. [3] At pp. 184-185.

[4] At pp. 185-186; the difficulty was caused by 5 George II c. 25 § 8; the Act improved the process of the court against contumacious defendants, but that section provided that its provisions were not to apply unless it was proved that the defendant had been in England two years next before the issuing of the subpoena.

[5] "Not only the responsibility exercised in so many spheres, but the actual attendance and drudgery of the Chancellor's various offices must, especially in these years, when his active influence was extended so far in domestic legislation and foreign policy, have been enormous. 'The Duke of Newcastle,' wrote Philip Yorke in 1748, 'never had any mercy on my father's time,' and the demands made upon his private leisure were incessant." P. C. Yorke, op. cit. ii 138.

[6] Below 294 n. 1, 295.

court ; and, in default of legislation, he pursued what he doubtless considered to be the only feasible policy. Instead of attempting to induce the Legislature to pass measures of reform, he tried by his own industry [1] and skill to obviate some of the worst defects.

Both P. C. Yorke in his life of Hardwicke,[2] and Twiss in his life of Eldon,[3] have tried to demonstrate that their heroes were not answerable for the admitted defects in the practice and procedure of the court of Chancery, and that they did their best to obviate the evils which flowed from the faulty system of procedure and pleading. There is considerable force in their arguments. Twiss succeeds in showing that Eldon tried very hard to keep abreast of his work ; that he directed all his great talents to the work of settling on lines which were technically and substantially correct the doctrines of his court ; and that all the delays of his court were not due to him. Yorke proves that the same assertions can be made of Hardwicke. In fact a reference to the Appendix,[4] in which is printed a report made to the House of Commons in 1810-1811 as to the state of business in the court of Chancery during Hardwicke's and Eldon's tenures of office, will show that it is difficult to say which of the two was the more industrious.[5] But, in one respect, there is no doubt that Yorke's defence of Hardwicke is more conclusive than Twiss's defence of Eldon. Twiss is obliged to admit that Eldon's habit of delaying his decrees aggravated the evils which flowed from the defects in the procedure and practice of the court.[6] But Yorke is able to prove that no such charge can be made against Hardwicke.[7] He is able to prove also that whilst Eldon's habit of relying upon his own researches into the facts of the case, and of paying little attention to the arguments of counsel, increased his delay in coming to a decision ;[8] Hardwicke's habit of listening attentively to the argument and of relying on the industry of counsel, both helped to shorten the argument,

[1] " Besides presiding in the House of Lords and his appeal work there, where causes were heard three times a week on Mondays, Wednesdays and Fridays, beginning at eleven o'clock in the morning, the Chancellor sat five or six hours a day in his own court, where the sittings often opened at half past seven. He held late evening sittings, sometimes cases by consent being heard at his own house, and frequently sat in his court till after midnight," Yorke, op. cit. ii 501-502.

[2] Vol. ii 500-509, 514-520.

[3] Vol. iii 327-408.

[4] App. II p. 742.

[5] Yorke, op. cit. ii 505-509.

[6] Twiss, Life of Lord Eldon iii 323-327 ; vol. i 437-438.

[7] Op. cit. ii 508.

[8] Yorke, op. cit. i 142, ii 525-526 ; this habit was defended by Eldon, see Ruscombe v. Hare (1817-1818) 6 Dow at p. 16, cited Twiss, op. cit. iii 353 ; and he told this story : " Lord Abergavenny told me he once compromised a suit, because his attorney had told him there was in his case a weak point, which, though the opposing parties were not aware of it, *that old fellow* would be sure to find out if the case came before him," ibid.

and enabled him to come to much more speedy decisions.[1] No doubt Hardwicke sometimes took a considerable time to consider his judgment. The case of *Casborne v. Scarfe* was heard on January 28 and March 4, 1737, and judgment was not given till March 25, 1738;[2] and there are other cases in which there was a delay of two or even three years between the hearing and the decree.[3] But whilst Eldon in many cases delayed his decision for many years,[4] it was very unusual for Hardwicke to delay his decision for longer than a few days.[5] He was always conscious of the need to relieve litigants of their anxiety as soon as he could. In the case of the *Duke of Marlborough v. Lord Godolphin*, after listening to a long argument, he said,[6] "as I am satisfied what decree I ought to make, it is not proper to put it off, merely for the sake of putting my thoughts into better order and method." And Daines Barrington, a contemporary, said that

> when a cause is once brought to a hearing, nothing can be more expeditious; the Lord Chancellor or the Master of the Rolls sits 5 or 6 hours in court most days of the year, and 19 suits out of 20 receive an immediate determination.[7]

At the beginning of the nineteenth century, some of those who attacked Eldon's habit of delaying his decrees, contrasted his procrastinations with Hardwicke's rapidity in decision.[8]

In fact, paradoxical as it may seem, it can be contended that the efforts which Hardwicke made to minimize the defects of the machinery of his court were almost too successful. His ability and industry were so successful in palliating these deep-seated defects, that the demand for reform was less urgent than it might otherwise have been; and so the opportunity for arresting the growing deterioration was lost. None of his immediate successors had the same ability or industry; and at the end of the century the terror excited by the French Revolution, and the need to concentrate the energies of the nation on the prosecution of the war with France, put an end to all chance of reform. And so the system of procedure and pleading was allowed

[1] Yorke, op. cit. ii 525; in the case of the Duke of Marlborough v. Lord Godolphin (1750) 2 Ves. Sen. at p. 83, having given judgment, he said next morning that "he had forgot to take notice of the cases cited for the defendants," but that there was one answer to them all; though his decisions were speedy, he was not unmindful of the needs of the law students—in the case of Basset v. Basset (1744) 3 Atk. at pp. 207-208 he said: "I had not time yesterday to consider the case so well as I should have done, but spoke chiefly from my memory, and therefore as I saw several gentlemen yesterday take notes, I think proper to mention what in my opinion is very material, that they may add it to the case."

[2] 1 Atk. at pp. 603, 605.

[3] See Yorke, op. cit. ii 505 n. 2.

[4] Vol. i 437-438.

[5] Yorke, op. cit. ii 505.

[6] (1750) 2 Ves. Sen. at p. 73.

[7] Observations on the Statutes 559.

[8] Yorke. op. cit. ii 508.

to go from bad to worse, until its own vices, and the increase of its business which followed upon the commercial prosperity of the country, caused it, as we have seen,[1] to become the worst of all the many abuses of the English judicial system.

Hardwicke's great and enduring work was the settlement of the substantive principles of equity on the sound lines upon which they had been developing from the time of Nottingham. The result of that work, and the result of his failure to effect any substantial reforms in the practice and procedure of his court, were the continued development of the substantive principles of equity on the sound lines upon which he and his predecessors had placed them, and the continued deterioration of its adjective principles. We have seen that the same assertion can also be made of the development of the substantive and adjective principles of the common law during this century—though in the case of the common law the procedural defects were not so grave as they were in the case of equity.[2] Consequently when the era of reform came, the reformers concentrated their attention mainly on the procedural defects of the systems of the common law and equity. We shall see that this phenomenon, coupled with the manner in which the relations between law and equity had come to be fixed during this century, is the key to the shape taken by the series of reforms which culminated in the Judicature Acts.[3] Hence it may be said that both the strong and the weak points in the development of the common law and of equity during this century have left their marks upon both the substantive principles and the procedural rules of the English law which governs us to-day.[4]

We have seen that Hardwicke's great constructive work in the sphere of the substantive principles of equity was recognized by his contemporaries.[5] It was true, as Daines Barrington said in his Observations on the Statutes,[6] that

> we owe the present beneficial and rational system of equity to the peculiar national felicity of the greatest lawyer and statesman of this (or perhaps any other) country, having presided in the court of Chancery nearly twenty years without a single decree having been reversed ;

and that

> nearly twenty years of well-considered decrees . . . have now established so clear, consistent, and beneficial systems of equity, that ignorance only can reproach it with being *jus vagum aut inconditum*.[7]

[1] Vol. ix 375 ; in 1783 Horace Walpole writes, Letters (ed. Toynbee) xiii 92, that he was advised not to leave undecided a question between his nephew Lord Orford and a beneficiary under Lord Orford's deceased mother's will, because " then it must go to Chancery, where it would not be decided in a dozen years, or perhaps twenty."

[2] Vol. ix 371-375. [3] Below 602-603. [4] Below 604-605.

[5] Above 252-253. [6] (1st ed.) 248. [7] (4th ed.) 558.

In fact, the formative period in the history of equity is over. There were some gaps still to be filled, some obscurities to be elucidated, some contradictions to be eliminated. We shall now see that this work was begun by the Chancellors and Masters of the Rolls who succeeded Hardwicke. Their decisions paved the way for the achievement of Eldon, just as the decisions of the Chancellors and Masters of the Rolls between 1700 and 1737 paved the way for the achievement of Hardwicke.

The Chancellors and the Masters of the Rolls (1756-1792)

The list of Lord Chancellors or Lord Keepers, Masters of the Rolls, and Commissioners who were appointed during a vacancy of the office of Chancellor, will be found at the foot of this page.[1]

Robert Henley,[2] earl of Northington, was descended from the Somersetshire Henleys. The fortunes of his branch of the family had been made by his great-grandfather Robert Henley, who had amassed a fortune from his office of master of the court of King's Bench on the pleas side. He employed Inigo Jones to build the family mansion at Grange in Hampshire, and left a landed estate of over £3000 a year. Robert Henley's grandson was Anthony Henley, a noted wit and literary and musical critic of William III and Anne's reigns. Robert Henley, the future earl of Northington, was Anthony Henley's second son. He was born in or about 1708, and educated at Westminster School.[3] Among his contemporaries at that school were Murray the future Lord Mansfield, and Clarke, the future Master of the Rolls. In 1724 he became a member of St. John's College, Oxford, and in 1727 he was elected a fellow of All Souls College. In the following year he became a member of the Inner Temple, and was called

[1] *Chancellors or Keepers.*

Willes, Smyth, Wilmot — Commissioners 1756-1757.
Northington 1757-1766.
Camden 1766-1770.
Yorke 1770.
Smyth, Bathurst, Aston — Commissioners 1770-1771.
Bathurst 1771-1778.
Thurlow 1778-1783.
Loughborough, Ashhurst, Hotham — Commissioners April 9-Dec. 23, 1783.
Thurlow 1783-1792.

Masters of the Rolls.

Sewell 1764-1784.
Kenyon 1784-1788.
Arden 1788-1801.

For the Masters of the Rolls during Hardwicke's Chancellorship, see above 245-246.

[2] Campbell, Chancellors v 174-228; Foss, Judges viii 303-308; D.N.B.; Memoir by his grandson Lord Henley.

[3] Hickey, Memoirs i 14, tells us that he and Henley were "sworn brothers, and many a scrape we mutually got each other into."

to the bar by that Society in 1732. The death of his elder brother in 1745 gave him the family estates in Hampshire and Dorset and a house in Lincoln's Inn Fields, which is now the home of the College of Surgeons.

Henley, throughout his life, was of a boisterous and jovial temperament; and his love of port laid the seeds of the gout which affected him in his later years—" he was once overheard in the House of Lords to mutter, after some painful walks between the Woolsack and the Bar, ' if I had known that these legs were one day to carry a Chancellor, I'd have taken better care of them when I was a lad.' " [1] At the same time his abilities and industry made him a sound lawyer, and he acquired a practice in the court of King's Bench and on the Western Circuit. At this period of his life he was a notable figure at the fashionable gatherings at Bath, where he met the lady whom he made his wife in 1743.[2] Bath he continued to cultivate after his marriage. It made him its recorder; it made him its member in 1747; and he continued to represent it till he became Lord Keeper in 1757.

He laid the foundations of his future success by the prudence and consistency of his political career. He attached himself to the party of Frederick, Prince of Wales—the Leicester House party; and, unlike many of the other members of that party, he did not desert it when Frederick died. This prudent step gained him the esteem and friendship of the Princess and of her son, the future George III. He was appointed first solicitor- and then attorney-general to the Prince; and, on becoming his attorney-general he took silk. When Murray became Chief Justice of the King's Bench and Lord Mansfield, a new government was formed. The Leicester House party and Pitt supported it, and Henley was made attorney-general. As was then usual, on his appointment to this office, he transferred his practice to the court of Chancery. Hardwicke had resigned the Chancellorship in 1756; and when the coalition ministry was formed in 1757, much difficulty was found in finding a Lord Chancellor. Mansfield

[1] In 1766 Horace Walpole alleged that he was never sober after dinner, and that for that reason, when he was President of the Council, causes were heard before the Council only in the afternoon, Letters (ed. Toynbee) vii 33; we have seen that he did not, like Hardwicke, sit in the evening to hear equity cases, above 294 n. 1.

[2] " She was," says Lord Henley, Memoir 15-16, " the daughter and co-heiress of Sir John Husband, of Ipsley, in Warwickshire, Bart., the last of a time-honoured race. . . . She was beautiful, but though extremely young, had from an illness so entirely lost the use of her limbs that she was only able to appear in public wheeled about in an arm-chair. Henley, attracted by the charms of her face and conversation, soon found his acquaintance ripen into a tender and lasting attachment. The waters produced so complete and effectual a cure that Miss Husband was not only enabled to comply with the custom of the place, by hanging up her votive crutches to the nymph of the spring, but to the end of a long life enjoyed a most perfect state of health." The marriage was a very happy one.

refused to quit the court of King's Bench, and Willes, C.J., made demands which the King would not concede.[1] It was due to this difficulty that Henley was made Lord Keeper in 1757. But his connection with the Leicester House party had made him personally unacceptable to the King, who refused to make him a peer. It was not till it became necessary to make him Lord High Steward, in order to preside at the trial of earl Ferrers, that he was raised to the peerage with the title of baron Henley of Grange. On the death of George II he reaped the reward for his fidelity to the Princess Dowager and her son. George III gave him the title of Lord Chancellor, and in 1764 created him earl of Northington. He continued to hold office in the administrations of Bute, Bedford, and Rockingham. But the King disliked the policy of the Rockingham ministry; and Northington, who was always grateful to those who had conferred benefits upon him, was anxious to see Pitt, to whose support he owed his first promotion, in office once more. He quarrelled with his colleagues over a report submitted by the law officers as to the government of Canada, and induced the King to dismiss his ministers, and entrust the formation of a new government to Pitt. Immediately afterwards (1766) for reasons of health, he resigned the Great Seal, and was made President of the Council. He held this post for a year; but his health compelled him to resign it in 1767, and he lived in retirement till his death in 1772.

We have seen that two volumes of reports of Northington's decisions were published by his grandson Eden,[2] afterwards the second baron Henley, and the author of a short life of Northington. It is clear from these reports that Northington, though not to be compared with such Chancellors as Nottingham and Hardwicke, was a very able lawyer.[3] He had a firm grasp of principle, a capacity for rapid and sound decision, and great powers of lucid and forcible exposition. His successors recognized his great qualities as a lawyer;[4] and Eldon summed him up correctly when he said that "he was a great lawyer and very firm in delivering his opinion."[5] Horace Walpole's sneers at his want of dignity are not borne out by the facts.[6] His address to earl

[1] Above 132. [2] Above 144.

[3] "If without the commanding genius and immense attainments of some who preceded him, or of one or two who have followed; yet his manly and decisive mind, his clear strong and vigorous judgment, united to a well-grounded and practical knowledge of his profession, have gained him a great and respectable name among the Chancellors of England," Henley, Memoir 4.

[4] Lord Loughborough said, "There is no person I respect more than Lord Northington," Lytton v. Lytton (1793) 4 Bro. C.C. at p. 459; Sir R. P. Arden M.R. said of one of his decisions that it was decided "as he generally did decide very clearly, for he seldom had much doubt," French v. Davies (1795) 2 Ves. at p. 579; in *Ex parte* Hill (1804) 11 Ves. at p. 651 Lord Eldon spoke of him as "a very considerable lawyer."

[5] Watkins v. Lea (1802) 6 Ves. at p. 640. [6] Henley, Memoir 42-43.

Ferrers after his condemnation is a model of forcible and appropriate eloquence.[1] He began his judicial career under considerable disadvantages. He succeeded one of the greatest of the Lord Chancellors, and, since he presided in the House of Lords as a commoner, he could not defend his decisions against the greater learning and experience of Lords Hardwicke and Mansfield. And yet during his nine years' tenure of office only six of his decrees were reversed or varied. His grandson says :[2]

> Of these reversals one is certainly erroneous ; and two more are of such a nature that the profession were at the time, and are still, greatly divided on the correctness of them. The number of those decisions which, though not made the subject of appeal, have been overruled or shaken, is extremely small, certainly not exceeding three : and in one or two instances, when later decisions had gone in contradiction to his opinions, maturer deliberation and more extensive inquiry into principles and cases, have established the accuracy of the original determination.

His judgments are well and clearly expressed, and are occasionally enlivened with pointed epigrammatic phrases.[3] His judgment in the case of *Norton v. Relly*[4]—the case of a nonconformist minister who had used his spiritual influence to obtain benefits from a maiden lady—anticipates Romilly's famous argument in *Huguenin v. Basely*.[5] It closes with these words : " I cannot conclude without observing that one of his counsel with some ingenuity tried to shelter him under the denomination of an independent preacher. I have tried in the decree I have made to spoil his independency."[6] His judgment in the case of the *Duke of Marlborough v. Godolphin*[7] gives a remarkably clear account of the history of the struggle of the law against landowners who wished to create unbarrable entails, and of the policy underlying the modern rule against perpetuities. He states with great clearness the rule that, after a contingent remainder to an unborn person for life, there could be no second remainder to that unborn person's children ;[8] and he anticipates the rule laid down in the case of *Cadell v. Palmer*[9]

[1] It is printed by Campbell, Chancellors v 196-197, and by Henley, op. cit. 44-47.
[2] Ibid 56.
[3] An interesting selection of some of his notable judgments is printed at the end of Henley's Memoir.
[4] (1764) 2 Eden 286.
[5] (1807) 14 Ves. 273 ; as Eden says in his note, 2 Eden at p. 291, it is clear from Romilly's famous argument in this case that this judgment of Northington's was not known to him.
[6] 2 Eden at p. 291 ; cp. his statement at the end of his judgment in the case of Alden v. Gregory (1764) 2 Eden at p. 285—a case of a fraudulent conveyance of property in Jamaica—that it was " happy for these abused, gulled, deluded people that there is a court of equity in Great Britain, out of the hurricanes and more tempestuous morals of Jamaica."
[7] (1759) 1 Eden 404 ; cp. vol. vii 209, 210, 212, 227.
[8] 1 Eden at pp. 415-416.
[9] (1832) 1 Cl. and Fin. 372 ; vol. vii 227.

that the utmost period for which property may be made inalienable, is a period of twenty-one years after a life or lives in being.[1] His judgment in the case of *Drury v. Drury*,[2] that a female infant could not by her marriage settlement, under which she accepted a jointure from her husband, bar her right, on attaining majority, to refuse the jointure and insist on her right to dower and to her distributive share in her husband's personalty, was reversed by the House of Lords.[3] But later lawyers have had some misgivings as to the correctness of that reversal.[4] The case is also remarkable for Hardwicke's vindication of the authority to be attached to conveyancing practice. Northington had commented sarcastically upon the arguments deduced by both sides as to conveyancing practice—"Mr. Attorney-General's conveyancers differ from Mr. Wilbraham's, for, according to his account, they never thought about it; which is natural enough, their time being more dedicated to perusal than thought."[5] Hardwicke, on the other hand, laid down the principle, which is historically correct,[6] that "the opinion of conveyancers in all times, and their constant course, is of great weight. . . . The received opinion ought to govern."[7]

Northington's most important and learned judgment was given in the case of *Burgess v. Wheate*.[8] We have seen that he and Clarke, M.R., differing from Lord Mansfield, held that if all the c.q. trusts disappeared, the legal estate existing in the trustees prevented an escheat to the lord, so that the trustees took beneficially.[9] This decision settled a very important question which Hardwicke had once alluded to, but had deliberately left undecided.[10]

Northington rightly treated the question as dependent upon the doctrines of tenure;[11] for escheat was essentially an

[1] 1 Eden at p. 418. [2] (1760-1761) 2 Eden 39.

[3] Sub nom. Earl of Buckinghamshire v. Drury 2 Eden 60; Gould B., Parker C.B., and Pratt C.J. supported Northington's judgment; Wilmot J., Bathurst J., Adams B., and Smythe B. considered it to be erroneous; Hardwicke, Mansfield, and the House of Lords agreed with the majority.

[4] Thus Thurlow was said to have approved Northington's opinion, Milner v. Lord Harewood (1811) 18 Ves. at p. 275 *per* Lord Eldon; in Seaton v. Seaton (1888) 13 A.C. at p. 67 Lord Herschell said that the case had "given rise to a great deal of criticism since the time when the decision in it was pronounced, and much disapproval has been expressed of it"; as he points out, it does not apply to agreements affecting the infant's own property.

[5] 2 Eden at p. 59. [6] Vol. iii 218-219; vol. vii 385-387.

[7] 2 Eden at p. 64. [8] (1757-1759) 1 Eden 177. [9] Vol. iii 72.

[10] "But then a question will arise, whether there can be an escheat of this equity of redemption to the lord; which has never yet been determined that there can: nor shall I determine it now. Neither has the question, whether there can be an escheat of a trust, been determined. Though it is a considerable argument, that otherwise there will be an end of escheats, because all the lands in England will soon be in trust, yet that is contrary to the old doctrine," Fawcet v. Lowther (1751) 2 Ves. Sen. at p. 304.

[11] "The question is a question merely of tenure, and the rights resulting therefrom *ob defectum tenentis*, and not a question of forfeiture," 1 Eden at p. 240.

incident of tenure.[1] He pointed out that if there was a tenant seised of the land (whether seised rightfully or tortiously [2] and whether or not he was a trustee) [3] there could be no escheat, because a tenant of the land was in existence, and escheat could only take place if there was no tenant. Equity had always followed this rule of law. In the Middle Ages it had never allowed an escheat to take place on the death of the c.q. use without heirs.[4] The modern trust was essentially the same as the mediæval use; and in moulding its incidents modern, like mediæval, equity had followed the law.[5] But modern, like mediæval, equity must follow the law with a discrimination which recognized the essential difference between a legal and an equitable estate:

> It is true this court has considered trusts as between the trustee, *cestuy que trust*, and those claiming under them, as imitating the possession. But it would be a bold stride, and in my opinion a dangerous conclusion, to say, therefore, this court has considered the creation and instrument of trust as a mere nullity; and the estate in all respects the same as if it still continued in the seisin of the creator of the trust, or the person entitled to it. . . . Where there is a trust it should be considered in this court as the real estate, between the *cestuy que trust* and the trustee, and all claiming by or under them; and the trustee should take no beneficial interest that the *cestuy que trust* can enjoy; but for my part I know no instance where this court ever permitted the creation of a trust to affect the right of a third person. The transmutation to a trustee is the same in its consequences as the transmutation of possession without a trust; it conveys to the trustee the legal burthens, and it invests the trustee with the legal privileges. The trustee is tenant to the praecipe, and liable to all onerous services. A special privilege of the highest benefit annexed by the common law to the possession of land could not be separated, retained, or suspended by the creator of a trust; the right of voting for coroners, sheriffs, and members of parliament. The legislature was obliged to interpose for that purpose.[6]

If the court were to disregard the conveyance to the trustee, if it looked only at the interest of the c.q. trust, it would follow that, if the trustee died without heirs and intestate, the lord would lose his escheat. But "to say that every lord in England shall lose his legal right of escheat in all cases where any man for his own convenience has put his land in trust," would be "*jus dare* not *jus dicere*." [7]

Lord Mansfield, on the other hand, drew a distinction between the mediæval use and the modern trust. The mediæval

[1] Vol. iii 67-70. [2] 1 Eden at pp. 243-244. [3] Ibid at p. 244.

[4] "The reason why there was no escheat on the death of *cestuy que use* without heirs in a court of equity seems to have been, that on such event no use remained, and consequently, there were no grounds for issuing the *subpoena*. A use could not be extended further than the *cestuy que use* could have held the estate in possession; to him his heirs and assigns," ibid at p. 244.

[5] Ibid at pp. 248-250. [6] Ibid at pp. 250-251. [7] Ibid at pp. 251-252.

use was considered "as a pernancy of the profits, as a personal confidence, as a chose in action, and now trusts are considered as real estates, as the real ownership of the land."[1] This development began with Nottingham;[2] and now "the forum where they are adjudged is the only difference between trusts and legal estates."[3] Therefore all the legal incidents of a legal estate, including the liability to escheat, are now attached to the trust;[4] and the difference applicable in the case of the mediæval use between those in the *post*, such as the lord, who were not bound by the use, and those taking *per* the trustee, who were bound,[5] is obsolete.[6] Conversely, if owing to the failure of the trustee's heirs, there is an escheat, the lord is bound by the trust.[7] This view was a reasonable view, in that it is based upon the substantially true view that the c.q. trust is for most purposes the real owner, and the trustee only formally the owner; it was approved by some lawyers in the eighteenth and nineteenth centuries;[8] and it was adopted by the Legislature in the nineteenth century.[9] But, like other of Lord Mansfield's reasonable views,[10] it was contrary to settled rules of English law.[11]

[1] 1 Eden at p. 217.

[2] "In my opinion trusts were not on a true foundation till Lord Nottingham held the great seals. By steadily pursuing, from plain principles, trusts in all their consequences, and by some assistance from the legislature, a noble, rational, and uniform system of law has been since raised," ibid at p. 223.

[3] Ibid at p. 223; cp. below 586.

[4] "Twenty years ago I imbibed this principle, that the trust is the estate at law in this court, and governed by the same rules in general, as all real property is by limitation," ibid at p. 224.

[5] See vol. iv 432-433, and 433 n. 1 for this distinction.

[6] "An use or trust heretofore was (while it was an use) understood to be merely as an agreement, by which the trustee, and all claiming from him in privity, were personally liable to the *cestuy que trust*, and all claiming under him in like privity. Nobody in the *post* was entitled under or bound by the agreement. But now the trust in this court is the same as the land, and the trustee is considered merely as an instrument of conveyance, and therefore is in no event to take a benefit. . . . The trustee can transmit no benefit; his duty is to hold for the benefit of all who would have been entitled, if the limitation had not been by way of trust. There is no distinction now between those in the *per* and *post*, except in that case of dower which is founded not upon reason, but practice," 1 Eden at pp. 226-227; for the case of dower see vol. iii 196-197: above 261 n. 1.

[7] 1 Eden at pp. 230-231.

[8] Vol. iii 72; but their views were based on a confusion between the Crown's prerogative right to take realty in the case of forfeiture or chattels in the case of *bona vacantia*, and its right as a lord to take by escheat; thus Lord Thurlow, when he said that he did not see how the case of Middleton v. Spicer (1780) 1 Bro. C.C. at p. 204,—a case of *bona vacantia*, could be distinguished from the case of Burgess v. Wheate, was mixing up these two very different rights of the Crown, see L.Q.R. iv 334-335; below 323.

[9] Vol. iii 72; 47, 48 Victoria c. 71 § 4.

[10] Vol. iii 109; vol. vii 19-20, 43-44; vol. viii 26-34.

[11] L.Q.R. iv 332-333; the Act of 1884 extended the law of escheat to equitable estates; for some criticism of this extension see Challis, Real Property (3rd ed.) 38-40; as Hardman says, Law of Escheat L.Q.R. iv 336, the right policy would have been a "judicious extension of the prerogatives of the Crown"; and this policy was followed by the Administration of Estates Act 1925 (15, 16 George V c. 23 §§ 45

We shall see that the divergence of opinion upon this question has a wider significance than its bearing upon the actual point decided in this case. It shows that Mansfield held views as to the relations between law and equity which, if correct, would make for the speedy elimination of the substantial differences between the principles of law and equity; but that both Northington and Clarke were inclined to hold that the relations between law and equity were and must be based upon a recognition of the continued existence of substantial differences between the principles of law and equity. But of this divergence of opinion as to the relations between law and equity, which is revealed in this and other cases of this period, I shall speak later.[1]

Northington's successor, Charles Pratt, earl Camden,[2] was the third son of Sir John Pratt,[3] Chief Justice of the King's Bench in George I's reign. He was born in 1713, and educated at Eton. Among his contemporaries at Eton were his lifelong friend, William Pitt, Lyttleton, and Horace Walpole. From Eton he went to King's College, Cambridge, and became a fellow of the college in 1734. In 1728 he had become a member of the Middle Temple, and was called to the bar by that Society in 1738. He joined the western circuit, of which his father had been a member; but for some time he was an almost briefless barrister—his father's reputation, he once said, had not been worth a guinea to him. So unsuccessful was he that he had some thoughts of leaving the bar and entering the church. Fortunately for himself, and for English law, he consulted Robert Henley, the future Lord Northington, who was then the leader of his circuit. Henley, who appreciated his abilities, persuaded him to try one more circuit, got him a junior brief in an important case in which he was the leader, and then, feigning illness, left him to conduct it. Pratt conducted it so effectively that briefs began to flow in, and he soon acquired a large practice both on circuit and at Westminster. In 1742 he was briefed in the famous Chippenham election petition,[4] the decision of which showed Walpole that he had lost his majority in the House of Commons, and caused his resignation.[5] His *Discourse against the Jurisdiction of the King's Bench by Process of Latitat*, which

(1), (*d*), 46 (1) (vii) which abolished escheat, and provided that the Crown should take all interests in land, the owner of which dies intestate and without heirs, as *bona vacantia*.

[1] Below 585-587.

[2] Campbell, Chancellors v 229-355; Campbell prints as an Appendix to his life (at pp. 356-365) a fragmentary life of Camden by his nephew George Hardinge, a Welsh judge, famous for his view that the Americans were represented in Parliament by the members for Kent, since the American provinces were held by the Crown as of the manor of Greenwich; Foss, Judges viii 357-363; H. S. Eeles, Lord Chancellor Camden and his Family; D.N.B.

[3] Below 432-437. [4] Campbell, Chancellors v 360. [5] Vol. x 75, 548.

he wrote in or about 1745, shows that he had become a learned lawyer.[1]

From the first he adopted those liberal principles to which he adhered throughout his life. In 1752, on the trial of Owen for publishing a libel,[2] he argued for the principle that a jury had the right, in a prosecution for libel, to return a general verdict—a principle which, as we have seen,[3] he maintained throughout his life, and helped to establish by supporting, in the last speech which he made in the House of Lords, the bill which became Fox's Libel Act.[4] In 1757, when Henley became Lord Keeper, it was due to Pitt's friendship that he was made attorney-general over the head of Philip Yorke, the solicitor-general. On his becoming attorney-general a seat in the House of Commons was found for him at Downton in Wiltshire.

As attorney-general he showed that he was prepared to give effect to the liberal creed which he had adopted before he had taken office. In his prosecution of Shebbeare [5] for seditious libel, he adhered to the opinion which he had expressed in *Owen's Case*, that the jury were the proper judges of the criminality of a libel, and therefore had the right to return a general verdict. He was the first attorney-general to lay down the principle that he was responsible for his actions to the public as well as to the ministry, and that he was "a judicial officer between the executive government and the subject." [6] Acting in accordance with this conception of his office, he refused to prosecute or to stop a prosecution on the orders of a department of the government, if he disapproved of this course of action.[7] With the hearty approval of Pitt he drafted and carried through the House of Commons the bill to amend the law as to the issue of writs of

[1] Printed in the Hargrave Law Tracts 393-405; vol. i 120 n. 7, 130-131; for a letter from Camden to Hargrave, in which he acknowledges his authorship, see Hargrave, Jurisconsult Exercitations ii 302; cp. Butler, Reminiscences 133.

[2] 18 S.T. 1203. [3] Vol. x 681. [4] Ibid; below 307-308.

[5] In his speech in 1792 on Fox's Libel Bill he said that "in the case of the King and Dr. Shebbeare, he went into court predetermined to insist on the jury taking the whole of the libel into consideration. So little did he attend to the authority of the judges on that subject, that he turned his back on them, and directed all he had to say to the jury," Parlt. Hist. xxix 1408.

[6] Hardinge says, "I have heard Lord Camden say, that he felt himself responsible, in the office of Attorney-General to the public as well as to the Ministers, and that he never prosecuted, or countermanded prosecution, or signed a warrant, if it was not the act of his own advice and judgment, by which he was ready and willing to abide, instead of throwing it off, and shifting it upon the Government; that he interposed himself as a judicial officer between the executive Government and the subject; thus he acted as a kind of referee accountable to both parties; . . . that he had made this point with Lord Chatham at their first interview; that he commended him for making it, and assured him of support, adding these memorable words: 'You shall not fight single-handed,'" Campbell, Chancellors v 360.

[7] See ibid 360-361 for a case where he refused to stop a prosecution when ordered to do so by the Treasury, since he knew that the accused had already been convicted of a fraud on the government.

Habeas Corpus, which, as we have seen, was lost in the House of Lords.[1]

In 1761 he succeeded Willes as Chief Justice of the Common Pleas; and it was while he held this office that his decisions in the general warrant cases gave him a popularity which was almost as great as that of Wilkes.[2] In 1765, on the accession to power of the Rockingham ministry, he was raised to the peerage. He signalized his appearance in the House of Lords by advocating the repeal of the Stamp Act, and maintaining the injustice of taxation without representation. When Chatham came into power in 1766, he was made Lord Chancellor in succession to Northington. It was during his period of office as Lord Chancellor that he showed some slight departures from his political principles, by defending the legality of the illegal embargo on corn,[3] and by remaining in office when it had become clear that his colleagues intended to proceed with the projects of taxing America, and of expelling Wilkes from the House of Commons. Probably his defence of the embargo was due in part to a feeling of gratitude to his old patron Northington, whose speech on this subject had been attacked by Mansfield—Camden's lifelong political opponent. But it cannot be denied that his phrase about "a forty-days tyranny" was most unfortunate, and that the constitutional principles he laid down on that occasion were wrong, and quite contrary, as his opponents pointed out, to his political creed.[4] His continuance in office was due to his reluctance to break up a ministry which was nominally led by Chatham, and after his illness and resignation by Grafton. His letters to Grafton show that he was opposed to the expulsion of Wilkes from the House of Commons, and to the manner of handling the crisis which arose when he was re-elected for Middlesex; and that he was equally opposed to the policy of coercing America.[5] Though he remained a member of the government, he was a silent member. At the end of 1769 he had made up his mind to retire;[6] and in January 9, 1770, when Chatham returned to the House of Lords, he supported his vote of censure on the government. A few days later (January 17) he was removed from office.

He remained in opposition till 1782. He was present at that memorable scene in the House of Lords on April 7, 1778, when Chatham fainted; and has left us a graphic account of it.[7] He was one of Chatham's executors; and he pronounced an elaborate eulogy on him on the occasion of the passing of the

[1] Vol. ix 119-121; above 238, 249.
[2] Vol. x 661-672.
[3] Ibid 365.
[4] Campbell, Chancellors v 266.
[5] The letters are printed by Campbell, Chancellors v 274-276, 278-281, 282-283.
[6] Eeles, op. cit. 108.
[7] Campbell, Chancellors v 345-347.

bill to provide an annuity for his descendants.[1] In the second Rockingham administration he held the office of President of the Council. He supported the bill to render government contractors incapable of sitting in the House of Commons ;[2] and the bill to give legislative independence to Ireland.[3] On the formation of the famous coalition between Fox and North he resigned. He opposed Fox's India Bill because he considered that its intended effect was to give Fox a fund of patronage which, added to the ministerial influence, " would have made him perpetual dictator." [4] In 1784 Pitt reappointed him to his old office of President of the Council, and he gave a steady support to Pitt's policy. He supported his measures for a freer trade with Ireland,[5] and for Parliamentary reform ;[6] and he helped Pitt to carry his regency bill in the House of Lords.[7] When the French Revolution caused the split between the old and the new Whigs he naturally sided with the former.[8]

His two last speeches in the House of Lords were made in 1792[9] in support of Fox's Libel Act.[10] He prefaced the first of these speeches, says the reporter in the Parliamentary History, by " a very affecting address," saying that " he had never thought to have troubled their lordships more, for the hand of age was upon him." [11] But he felt obliged to intervene to support a bill which gave effect to a view of the law which he had advocated all his life. After taking the opportunity to praise the genius of his old rival Mansfield, who had held a view contrary to his own, on this and on other questions,[12] he said that his mind was so clear on this point, " that, if all the benches of the courts of law, all the bar

[1] Parlt. Hist. xix 1239-1240. [2] Vol. x 107, 520. [3] Vol. xi 31-32.

[4] In a letter cited Eeles, op. cit. 155, he says, " Mr. F. feeling that he had not his master's confidence formed a plan for his own security to get possession of the E. India patronage by vesting it in seven of his own friends, by which means the Parliamentary influence of a private man would have been almost equal to the great power of the Prerogative which is the common fund of the minister to manage the Parliament. This possession would have made him too powerful to have been turned out and consequently the private being united to the ministerial influence would have made him perpetual dictator. The Parliament would have been bought and the K. silenced."

[5] Vol. x 121. [6] Ibid 120. [7] Ibid 441.

[8] See his letter to Burke thanking him for his " Appeal from the New to the Old Whigs," cited Campbell, Chancellors v 344-345.

[9] Parlt. Hist. xxix 1404-1409, 1536-1537.

[10] 32 George III c. 60. [11] Parlt. Hist. xxix 1404.

[12] " While he differed from Lord Mansfield in this, he thought himself, because of dissensions between them on former occasions, bound to express, in the strongest terms he could use, his very high respect for that noble and truly learned lord, who if he were there, would bear him witness, that personal rancour or animosity had never mixed with their differences," ibid 1407-1408 ; Campbell, Chancellors v 349, followed by Eeles, op. cit. 186, makes him add, " When after this last effort, I shall disappear, I hope that I, too, may have credit for good intentions with those who differ from my opinions, and that perhaps it may be said, ' through a long life he was consistent in his desire to serve his country ' "—but there is no warrant for this in the Parlt. Hist. or in Cobbett's Debates.

and the unanimous voice of Parliament should declare it to be otherwise, he would not change his opinion." [1] His success in inducing the House of Lords to pass the Act was a personal triumph, and the declaratory form in which it was drafted, though historically of dubious correctness,[2] made that triumph quite complete. Camden appeared no more in the House of Lords, and he wished to resign his office of President of the Council. But the King refused to part with him, and he remained in office till his death on April 13, 1794.

Camden was a great Chancellor. He was a master of the law and practice of his court,[3] and satisfied both the suitors and the powerful bar who practised before him.[4] He had a sound judgment, a quick apprehension, and powers of luminous exposition.[5] Butler, who had seen him presiding in his court, tells us [6] that

> his judicial eloquence was of the colloquial kind,—extremely simple: diffuse, but not desultory. He introduced legal idioms frequently, and always with a pleasing and great effect. . . . Sometimes, however, his lordship rose to sublime strains of eloquence: but their sublimity was altogether in the sentiment; the diction retained its simplicity, and this increased the effect.

He was always careful to follow precedents, and to give full effect to the statute law.[7] But, owing to the fact that he had a very keen memory, he seldom wrote his judgments.[8] We therefore have but meagre reports of his decisions in the court of Chancery. One of the better known of his decisions is his judgment in the case of *Smith v. Clay*,[9] in which he refused to allow a bill of review to be brought more than twenty years after the making of a decree. The period of twenty years, he held, was adopted by equity by analogy to the rule, laid down by a statute of 1699,[10] for the bringing of writs of error on fines and

[1] Parlt. Hist. 1408.

[2] Vol. x 680-688.

[3] Hardinge says, "I was present when he took his seat as Chancellor in Lincoln's Inn Hall, and was not a little surprised, but more than a little pleased, at his readiness in deciding off hand upon the variety of motions which he heard upon what is called 'a Seal Day,' though he had left the court for some years," Campbell, Chancellors v 363.

[4] Ibid; Hardinge says, "He found a bar elevated in its character for talents and learning. Mr. Yorke was at the head of it. Mr. De Grey, the new Attorney-General, had begun to feel his ground firm as a rock under him, and Lord Rosslyn, then Mr. Wedderburn, gave powerful hints of that brilliant eloquence that was in the future to make him so distinguished a figure at the bar and in the House of Commons."

[5] Ibid.

[6] Reminiscences 132-133.

[7] Hardinge says, "no judge had less conceit of his own undisciplined opinion against the weight of precedents fixed and settled. He likewise avoided the practice of repealing Acts of Parliament by judicial construction, saying, that 'he could not be more or less enlightened or liberal than his law giver had enabled him to be,'" Campbell, Chancellors v 363.

[8] Ibid.

[9] (1767) Ambler 645.

[10] 10, 11 William III c. 14 § 1.

recoveries.[1] That his decisions were generally sound is proved by the fact that only one was reversed,[2] and that Lord Eldon had considerable doubts as to the correctness of this one reversal.[3] One useful reform of the law stands to his credit—the *nullum tempus* Act of 1769,[4] which provided a sixty years' limitation against claims by the Crown.

In the Privy Council and the House of Lords he was equally successful. "At the Privy Council," says his nephew Hardinge,[5] "I have known him often go through a cause which had numerous and complicated facts without a note of the arguments delivered by the Counsel, and with no written preparation of any kind—with a force and perspicuity almost inconceivable." "In causes of a mixed nature from Guernsey and Jersey, his temper, address, and zeal for the good-will of those islands to this country, without offence to judicial conclusions, were infinitely meritorious and most critically useful." [6] In the House of Lords he concurred with Lord Mansfield's famous judgment in the case of *Harrison v. Evans*.[7] In the case of *Donaldson v. Becket* he was a party to the decision that copyright depended solely on the Act of 1709, so that no perpetual copyright was possible.[8] In fact, both in his judgment in that case, and in 1774, when opposing a bill to extend the period of copyright,[9] he used some fallacious rhetoric to minimise unduly the right to authors to receive the due reward of their labours.[10] But the most celebrated case in which he took part, and in which he gave the leading judgment, was the case of the *Duke of Hamilton v. Douglas*,[11] in which the plaintiff claimed the defendant's estates on the ground that he was not the son of his mother, but a supposititious child. The Scottish courts had decided for the plaintiff, but the House of Lords, largely owing to Camden's speech, reversed this decision—a reversal approved by Lord Campbell.[12] Camden's nephew has given us the following account of that speech : [13]

[1] Ambler at p. 648. Other notable cases which he decided are Silk v. Prime (1766) Dick. 384, 1 Bro. C.C. 138 n.; Attorney-General v. Lady Downing (1769) Ambler 571—a case in which, as Chief Justice, he had previously assisted Northington, ibid 550; Rippon v. Dawding (1769) Ambler 565; Hill v. Spencer (1767) Ambler 641; Francis v. Rucker (1768) Ambler 672; Morecock v. Dickens (1768) Ambler 678.

[2] Darley v. Darley (1767) Ambler 653.

[3] Southey v. Lord Somerville (1807) 13 Ves. at p. 492.

[4] 9 George III c. 16; vol. x 355 n. 6.

[5] Campbell, Chancellors v. 363.

[6] Ibid 362.

[7] Vol. x 113; Campbell, Chancellors 287.

[8] Vol. vi 378; (1774) 4 Burr. 2408.

[9] Parlt. Hist. xvii 1401-1402.

[10] Ibid 999-1000.

[11] A very clear account of this case is given by Campbell, Chancellors v 288-290; Horace Walpole, Memoirs of George III 298-307; Walpole at p. 304 says that Camden's speech "had the most decisive effect."

[12] Chancellors v 290 *note*.

[13] Ibid 363-364.

I had an office under him, and I attended him in his coach to the House of Lords. . . . Though I knew him to be anxious, I never had seen him so tremulous and flurried. He was afraid of the demand upon him, which fear he told me had induced him to write, not the whole of his argument, but the heads of it. He had shown them to me in his own hand, fairly written, upon seven or eight pages of folio paper. He said that he was afraid of not using them, and was afraid of using them too —but as it was not his habit—in such an assembly to look at a paper it should throw his thoughts into confusion. When he began to address the House, my attention was fixed upon this paper which he had rolled up. Not having at first any other occasion for it, he waved it as a kind of trencheon. From one topic he was led on to another, and through a very long as well as able and impressive argument he never unfolded that paper, nor was at a loss for a single fact. Lord Mansfield who followed him, spoke from notes, and consulted them without reserve.

But we have seen that it is in the sphere of public law that he won his greatest fame.[1] As a judge in criminal cases he was humane,[2] and as a constitutional lawyer a worthy successor to Coke and Holt—as great a master as they were of the history of the common law and of its modern rules.

When in January, 1770, Camden joined Chatham in his attack on the government, it was clear that he could no longer hold the office of Lord Chancellor. His dismissal was only delayed till a successor could be found. This was no easy task. The obvious man to succeed Camden was Charles Yorke, the second son of Lord Hardwicke, and the leader of the bar. But Charles Yorke was a member of the now united opposition; and acceptance of office involved a breach with all his political friends.

Charles Yorke[3] was born December 30, 1722. As early as December 1, 1735, he was admitted a member of the Middle Temple. In 1742 he migrated to Lincoln's Inn, and was called to the bar by that Society, February 1, 1746. He became a bencher in 1754 and Treasurer in 1756.[4] He had become a member of the House of Commons in 1748. His success both at the bar and in the House of Commons was rapid; and in 1756 he became solicitor-general. In 1761, after Pitt's dismissal, he resigned. But, in the following year, when Pratt had been made Chief Justice of the Common Pleas, he accepted Bute's offer of the attorney-generalship. In that capacity he acted for the

[1] Vol. x 672.

[2] Hardinge says, "I never saw him administer criminal justice, but I am told he was remarkably humane, feeling and compassionate. I remember that he thought Lord Hardwicke's Act, which made forgery capital, too severe, and that he often said, 'no policy could reconcile him to it,'—adding, however, that 'he was, perhaps, in fault, but that he could not help it,'" Campbell, Chancellors v 362.

[3] Ibid 366-431; Foss, Judges viii 414-420; D.N.B.

[4] Black Books of Lincoln's Inn iii 359.

government in the proceedings which arose out of the publication of no. 45 of the North Britain. In 1763 he resigned—probably by reason of the pressure put upon him by Pitt. But he disappointed Pitt by taking the same view as to privilege as he had taken when in office, and asserting in the debate on this question that the publication of a seditious libel was not privileged. On the other hand, in the debate on general warrants, he argued against their legality. In 1765 he accepted the office of attorney-general in the Rockingham administration.[1] He resigned that office when Pitt returned to power, and disappointed him by making Camden Lord Chancellor.

Yorke was the most gifted of Hardwicke's children. He was a man of letters [2] and the friend of many literary men,[3] a consummate lawyer [4] and a successful legal author,[5] a powerful advocate,[6] popular with the bar,[7] a successful member of the House of Commons.[8] But he lacked the massive common sense, the cool head, and the self-confidence of his father. He

[1] Hickey, who was an articled clerk in his father's firm, tells us, Memoirs i 70-71, that Northington was often rude to Charles Yorke, who irritated the Chancellor by coming late into court; he relates the following incident at which he had been present: "There being a Cause of importance fixed for a certain day, Lord Northington at the rising of the Court said, 'I shall on Thursday morning sit precisely at eight o'clock and hope Mr. Attorney-General you will be ready.' Mr. Yorke, bowing answered, 'Certainly, My Lord.' The day arrived and Mr. Yorke, according to custom, did not make his appearance till near ten, when he began apologizing for being so late, whereupon the Chancellor abruptly stopped him in the most ferocious manner saying, 'Don't beg pardon, Mr. Attorney, for I care not when you come or whether you come at all, but beg your Client's pardon, whose money you have taken and done him no service for it.'"

[2] For the Athenian Letters, in writing which he took a large part, see P. C. Yorke, Life of Hardwicke i 207-208.

[3] He corresponded with Thomas Birch, Warburton, and Montesquieu, and sometimes joined the house parties of Ralph Allen, the friend of Pope and Pitt, at Bath, ibid ii 143-144.

[4] Mansfield, writing to Warburton, speaks of his "great knowledge of the law, erected on general and enlarged principles of science, unknown to the generality of the profession"; and the Duke of Newcastle told Hardwicke that Mansfield had said that he had never heard a finer argument than his son had made in the Duke of Devonshire's case, ibid ii 572-573; he made a prodigious impression on the learned Hargrave, below 410-411, whose turgid effort at panegyric in his Preface to Hale's History of the House of Lords clxxx n. (*k*.), was satirized in the following lines:

> "With Hargrave to the Peers approach with awe,
> And sense and grammar seek in Yorke and law."

[5] For his tract on "Considerations on the Law of Forfeiture for High Treason," written in support of the Treason Act of 1744, see P. C. Yorke, op. cit. i 328-329; below 362-363.

[6] For his speech in Lord Ferrers' case on the relation of insanity to crime, see P. C. Yorke, op. cit. ii 573-574; he pointed out, *inter alia*, a fact too often forgotten to-day, that an opinion may be "right in philosophy, but dangerous in judicature."

[7] See the account of his reception by the bar when he came into court in 1763 after he had ceased to be attorney-general, ibid iii 554-555; Hickey, Memoirs i 70, tells us that he "greatly liked" him, and disliked Northington because he was uncivil to him.

[8] P. C. Yorke, op. cit. ii 142; iii 301, 478, 480-481; Walpole, Letters (ed. Toynbee) v 399.

was easily discouraged, apt to be too easily persuaded, and, at the same time, ambitious.[1] He was naturally disappointed when, in 1757, Pratt was made attorney-general over his head,[2] and more especially in 1766 when he was made Lord Chancellor ; [3] for as early as 1757 it had been thought that he would be Henley's successor ; [4] and he had always wished to occupy the position which his father had held. When Camden broke with the government the Great Seal was at length within his grasp. But to accept it meant a break with all his political friends ; for his brother Lord Hardwicke, Chatham, and the whole party of the Rockingham Whigs were united in their opposition to the court. At first he was true to his political principles. After consulting his political friends, he refused the duke of Grafton's offer of the Great Seal, and reiterated his refusal at an interview which he had with the King. But at a second interview with the King, he was over-persuaded, and consented to take office.

On January 17, 1770, the Great Seal was taken from Camden and delivered to Yorke. On his way home he called at Rockingham's house to announce the news, where he found a large party of his former political friends assembled. His reception made him sensible of his apostasy.[5] Three days later he died. The condemnation of his friends, the consciousness that he had betrayed them, the mental conflict between loyalty to his party and ambition to which he had been subjected during the preceding weeks, were too much for a sensitive, and vacillating temperament, and a constitution which was not too strong. Some strong spirit which he had taken brought on a violent sickness, and caused the rupture of a blood vessel. This was the cause of his sudden death. There is no reason to think that he took his own life.[6] It was a pitiful and tragic end to a brilliant career at the bar, which might have been followed by an

[1] P. C. Yorke, op. cit. i 213 ; ii 140-141, 145, 174 ; in 1762 he contemplated giving up the bar, but was dissuaded by his father, ibid iii 416.

[2] Above 305. [3] Above 306.

[4] So his brother said, see P. C. Yorke, op. cit. ii 572.

[5] Cooksey, Sketches 42-43.

[6] Campbell, Chancellors v 415-426, sums up all the evidence which points to this conclusion ; the evidence of Sheldon who married one of his relatives, as reported by Cradock in his Memoirs, cited Campbell, op. cit. v 425-426, strongly supports this conclusion ; Cradock, Memoirs i 92-93 says, " he was much agitated after some hasty reproaches that he had received on his return from having accepted the Seals, and he hastily took some strong liquor, which was accidentally placed near the sideboard, and by its occasioning great sickness he broke a blood vessel. The friend from whom I received the account, assured me that he was present, when the corpse was left openly in the chamber, that the attendants might gratify their curiosity, and see that the death could not be truly attributed to the direct means which had been so publicly and so confidently asserted " ; cp. Walpole's Letters (ed. Toynbee) vii 356-357.

equally brilliant career on the bench; for I think Lord Campbell is right when he says: [1]

> As an advocate, as a law officer of the crown, and as a member of the House of Commons, he was almost equal to his father, and if he had enjoyed the good fortune to preside for twenty years on the bench, as his father did, I make no doubt that he would have rivalled his father's fame as a magistrate. In literature he was infinitely beyond him.

After Yorke's death it was found so difficult to find a person willing to accept the office of Lord Chancellor that the Great Seal was delivered to three commissioners who held it for a year.[2] Both Mansfield and Wilmot refused it; and at length on January 23, 1771, it was handed over to Henry Bathurst,[3] who was made Lord Chancellor, and, at the same time created baron Apsley.[4]

Bathurst was born May 30, 1714. He was the eldest surviving son of earl Bathurst—one of the twelve peers created in 1711 to support the treaty of Utrecht, and the admired friend of many generations of literary men,[5] who lived till 1775.[6] He was called to the bar in 1736; and from 1735 to 1754 he represented Cirencester in Parliament. As the leader of the Oxford circuit he led for the Crown in the trial of Elizabeth Blandy; and he had been first solicitor and then attorney-general to Frederick, Prince of Wales. In 1754 he was made a judge of the court of Common Pleas. He was appointed one of the commissioners to whom the Great Seal was entrusted in 1770; and, since he was thought to be the most incapable of the three, there was considerable surprise when he was made Lord Chancellor. But he was a steady supporter of Lord North, and so held office till 1778. As Lord Chancellor he took part in the decision of the case of *Donaldson v. Becket*, and followed the opinions of those judges who held that copyright depended

[1] Op. cit. v 427.

[2] Above 297 n. 1.

[3] Campbell, Chancellors v 432-472; Foss, Judges viii 239-243; D.N.B.

[4] He built Apsley House at Hyde Park Corner, later the town house of the Duke of Wellington; it was built, Campbell tells us, op. cit. v 472 n., on the site of the Hercules Pillars—the inn frequented by Squire Western.

[5] He introduced himself to Sterne at the Prince of Wales's court, and Sterne said of him that he was a prodigy, "for at eighty-five he has all the wit and promptitude of a man of thirty; a disposition to be pleased, and a power to please others beyond whatever I know,—added to which, a man of learning, courtesy and feeling," cited Campbell, Chancellors v 434; the son was not quite so jovial a character as the father—hence the tale that when, at a party at the Chancellor's house, the Chancellor had retired early, his father said to the rest of the company, "now my friends since the old gentleman is off, I think we may venture to crack another bottle," Foss, Judges viii 242.

[6] As Burke pointed out a few months before the earl's death, in his speech on reconciliation with America, the great development of the American colonies had taken place within the compass of his single life, see the passage cited Campbell, Chancellors v 435-436.

solely on the Act of 1709;[1] and, as Lord High Steward, he presided at the trial of the Duchess of Kingston, which gave rise to considerable discussion as to the effect upon criminal proceedings for bigamy in a temporal court, of a sentence of an ecclesiastical court, in a suit for jactitation of marriage, which declared that the alleged first marriage had not taken place.[2] Bathurst resigned in 1778, and in 1779 he was made Lord President of the Council, which office he held till North resigned in 1782. He died in 1794.

Bathurst was honest and honourable; and his kindly manners made him popular with the bar. But he was the one Chancellor of the eighteenth century whose ability was obviously inadequate.[3] None of his decisions can be said to have made any material addition to equitable doctrine—except perhaps the decision that, in view of the Charitable Uses Act of 1736,[4] assets could not be marshalled in favour of a charity.[5] But he was wise enough to be guided wherever possible by the judges, and by his very experienced Master of the Rolls, Sir Thomas Sewell;[6] and we who write legal history may remember that he was on the right track when he said that "when this Court first granted injunctions, it seems to have taken its jurisdiction from the writ of prohibition of waste."[7] In his younger days he had made a digest of some of the rules of evidence and points of procedure arising in trials at *nisi prius*, which his more learned nephew Buller,[8] whom he deservedly raised to the bench, used when he wrote his successful book on *Trials at Nisi Prius;*[9] and it is to his credit that he was a friend and patron of the learned Sir William Jones.[10]

He was succeeded in 1778 by a man of a very different intellectual calibre—Edward Thurlow.

Thurlow[11] was born December 9, 1731. From early childhood he showed the self-will, the high spirits, and the rebellious

[1] Parlt. Hist. xvii 1001-1002; vol. vi 378.

[2] (1776) 20 S.T. 355; below 700-701.

[3] Horace Walpole, Letters (ed. Toynbee) ix 82, tells the following tale of him: Wilkes "was told [that the] Lord Chancellor intended to signify to him that the King did not approve the City's choice: he replied, 'Then I shall signify to his Lordship that I am at least as fit to be Lord Mayor as he to be Lord Chancellor.' This being more gospel than everything Mr. Wilkes says, the formal approbation was given."

[4] 9 George II c. 36.

[5] Hillyard v. Taylor (1773) Ambler 713; following Foster v. Blagden (1771) ibid 704, and earlier cases.

[6] Below 327-328; in the case of Palmer v. Mure (1773) Dick. at pp. 490-491 he said, "I ought to apologize for keeping the matter so long before the Court: at first I differed in opinion from his Honour, but he hath now convinced me . . . and I am first to thank him for the great pains he hath taken upon the occasion."

[7] Goodeson v. Gallatin (1771) Dick. 455; cp. vol. ii 248-249; vol. iii 121-122.

[8] Below 488-492.

[9] Below 354.

[10] Vol. xi 220-221; at the beginning of Jones's career, when he was in pecuniary difficulties, he appointed him a commissioner of bankrupts, Campbell, Chancellors v 463.

[11] Campbell, Chancellors v 473-678; Foss, Judges viii 374-385; D.N.B.

disposition, which were his salient characteristics during the greater part of his life. For his first school-master, Brett, who was a rigid disciplinarian, he had and continued to have an unalterable hatred.[1] At King's School, Canterbury—his second school—he made sufficient progress in Latin and Greek to win a Perse scholarship at Gonville and Caius College, Cambridge. At Cambridge he was noted for his idleness and insubordination; and for insulting behaviour to the Dean of the College he was asked to remove his name from the books. But it is probable that both at Cambridge, and later in London, he worked considerably harder than he appeared to do;[2] for, while apparently leading an idle and frivolous life, he made himself a competent classical scholar[3] and a competent lawyer. After leaving Cambridge he studied law in the office of Chapman, a solicitor of Ely Place, Holborn, where he had as his fellow-pupil the poet Cowper,[4] who never ceased to admire him.[5] He was called to the bar by the Inner Temple, November 22, 1754.

His powers of forcible argument and repartee, coupled with his loud and deep voice, and the striking appearance of his regular features, piercing eyes, and black bushy eyebrows, made him a famous figure at Nando's coffee-house, which was his favourite haunt, and other coffee-houses and taverns in the vicinity of the Temple. But for some time after his call he had little practice. He is said to have made his name by the way in which, in 1758, at the trial of the case of *Robinson v. Earl of Winchelsea* before Lord Mansfield at the Guildhall, he put down Sir Fletcher Norton,[6] who was noted for his rudeness to the bar and the attorneys. Four years later, to the surprise of the profession, he took silk. Probably this advancement was due to Viscount Weymouth, through whom he was returned in 1765 as member for Tamworth.[7] As a silk, he soon made his name

[1] When Thurlow was attorney-general, he was followed into a shop at Norwich by Brett, who asked him if he did not recollect him; Thurlow is said to have replied, "I am not bound to recollect every scoundrel who chooses to recollect me," Campbell, op. cit. v 480 n.; D.N.B.

[2] Cradock, Memoirs i 79 says, "it was generally supposed that Thurlow in early life was idle; but I always found him alone at study in the morning when I have called at the Temple; and he frequently went no further in an evening than to Nando's, and then only in his dishabille. . . . He was always clear headed and read to good purpose."

[3] For his attainments as a classical scholar see Campbell, op. cit. v 478-479, 638-641.

[4] Cowper wrote many years after, "I did actually live three years with Mr. Chapman, that is to say, I slept three years in his house, but I lived, that is to say I spent my days in Southampton row, as you very well remember. There was I and the future Lord Chancellor, constantly employed from morning till night, in giggling and making others giggle, instead of studying law," cited ibid 485.

[5] Ibid 520-521, 645-648.

[6] Below 560-562.

[7] D.N.B.; chronology would seem to prevent acceptance of the tale that he got his silk gown through the influence of the duchess of Queensberry, whose acquaintance he had made in connection with the Douglas case, see Foss, Judges viii 378-379; for this case see above 309-310.

as a good lawyer and a powerful advocate—though he did not give up the gay life which he had lived ever since he was a student. Hickey's account of him, and the story which he tells of his successful attempt in 1766 to get an opinion from him, give a vivid picture of Thurlow in these early years, and help us to understand what manner of man he was. Hickey, who had been articled to his father's partner in January, 1766, says: [1]

Mr. Thurlow was at that time just rising into eminence as a lawyer. My father who considered him as possessing abilities greatly superior to any of his contemporaries, was anxious as far as lay in his power, to bring him forward. Mr. Thurlow, though indefatigable in his attentions to whatever he once undertook, was by no means a laborious man in general, especially during the early part of his life, when he avowed his disinclination to going to his desk, or looking into a book in the evening. Consequently, he never, except on particular occasions, was to be found at his Chambers after five o'clock in the afternoon, and in order to avoid being interrupted in his hours of recreation by Attorneys or their Clerks, it was a rule with him never to dine two following days at the same house, but to use various taverns and coffee houses (in the neighbourhood of the Temple where he lived), indiscriminately, and wherever he went the waiters had a general and positive order, if enquired for to deny his being there, and this usually succeeded.

A business was transacting in our office, whereon my father was extremely desirous of consulting Mr. Thurlow. The matter pressed in point of time, not an hour was to be lost, and as two of the clerks who were sent in search of him had failed in their object, my father bid me try what I could do, and if I succeeded he would give me a guinea. Out I set, and as I had at the commencement of my clerkship made friends with most of the head waiters in the taverns and coffee houses in Chancery Lane, Fleet Street, and that part of the town, I felt confident I should obtain the promised reward, and did so, though after more difficulty than I expected. After going the usual round in vain, I called upon the Bar-maid at Nando's,[2] with whom I was a favourite, and entreated her to tell me where Mr. Thurlow was. At first she protested she knew not, but by a little coaxing I got the secret, and proceeded to the Rolls tavern, where I had already been, but there happening to be two new waiters who were of course unacquainted with me, they were faithful to their orders, and denied his being there. Upon my second visit I went into the Bar, where addressing the landlord, I told him I had ascertained Mr. Thurlow was in the house, and see him I must. The host was inflexible, and would not *peach*, but in a few minutes after I entered, he called out—"Charles carry up half a dozen of red sealed port into No. 3."

It instantly struck me that must be the apartment my man was in, and as the waiter passed with the basket of wine I pushed by him, ran up to No. 3, boldly opened the door, and there sat Mr. Thurlow and four other gentlemen at a table with bottles and glasses before them. Upon seeing me he exclaimed: "Well, you young rascal, damn your blood. What do you want? How the devil did you find me out? Take away your papers, for I'll be damned if I look at one of them.

[1] Memoirs of William Hickey i 57-59.

[2] Below 320 n. 5; the establishment was kept by a Mrs. Humphries, and the bar-maid was her daughter, Cradock, Memoirs i 71.

Come, Come you scoundrel I know what you came for ; you take after your father and are a damned drunken dog, so here, drink of this ", filling a tumbler of wine which I had not the smallest objection to, and drank to the health of the company. " But how did you find me out " ? asked Mr. Thurlow. " Why, Sir," answered I, " I heard the master of the house order six bottles of port for number three, and I was certain there you must be, so up I ran and entered without ceremony."

This made a great laugh, putting Mr. Thurlow into high good humour who swore I was a damned clever fellow, and should do, and turning to his companions he said—" This is a wicked dog, who does with me as he pleases, a son of Joe Hickey." I was thereupon particularly noticed by them all, and pulling out my papers Mr. Thurlow looked them over and immediately wrote a note to my father upon the subject, which I carried home, thereby gaining not only the promised guinea, but credit for the manner in which I had effected the business.

Thurlow made his name by his great speech for the appellant in the famous Douglas Case in 1768-1769. It is said that his retainer in this case was due to the fact that some of the appellant's agents had heard him discuss the case at Nando's coffee-house with such ability that they retained him. The vigour of his advocacy, and the reflections which he made upon Andrew Stuart, the Duke of Hamilton's agent, led to a duel with Andrew Stuart.[1] His steady support of North's government in the House of Commons, and his growing reputation as a lawyer, marked him out for promotion. He was made solicitor-general in 1770, and attorney-general in 1771. As solicitor-general he prosecuted the publishers of Junius's letter to the King, and ably defended both the use of *ex officio* informations for libel,[2] and Lord Mansfield's view as to the restricted functions of the jury in prosecutions for libel.[3] As attorney-general he prosecuted Horne Tooke for a seditious libel.[4] Horne Tooke had got up a meeting to sympathize with the Americans, and had issued an advertisement inviting subscriptions for the relief of the widows and orphans of those Americans who had been " murdered by the King's troops at Lexington." Thurlow got a verdict, and asked the court to punish Horne Tooke with the pillory.[5] But the court refused to award this punishment—a course which won the approval of Dr. Johnson, sturdy Tory

[1] Stuart afterwards wrote and printed a series of letters to Lord Mansfield attacking his judgment in the Douglas case.

[2] (1770) R. v. Miller 20 S.T. at p. 889 ; see vol. ix 238-244 for the history of the criminal information.

[3] (1770) R. v. Woodfall 20 S.T. at pp. 907-908 ; S.C. 5 Burr. at pp. 2663-2664 ; vol. x 676-680.

[4] (1777) 20 S.T. 651 ; Horne Tooke had been taken into custody by order of the House of Commons for a libel in 1774, but his authorship could not be proved, and he was discharged, Parlt. Hist. xvii 1003-1047.

[5] 20 S.T. at pp. 781-783 ; Cradock, Memoirs i 98-99, says that he stood near Horne Tooke during the trial, and that Tooke " from his own deep knowledge of the law was able to combat all its subtleties and convert every circumstance to his own advantage, to the admiration and astonishment of the most crowded court."

though he was.[1] Thurlow's arguments in the case of *Donaldson v. Becket*,[2] and in *Campbell v. Hall*,[3] showed that he was a learned lawyer as well as a powerful advocate. In Parliament he won the King's favour by the ability with which he defended the government's disastrous American policy.

When Bathurst resigned Thurlow was his obvious successor. He was made Lord Chancellor on June 19, 1778, and raised to the peerage under the title of baron Thurlow of Ashfield in the county of Suffolk. In the House of Lords he was a tower of strength to the government; and, by his celebrated reply to the Duke of Grafton, who had been foolish enough to taunt him with his plebeian birth,[4] he established an ascendancy over the House, which he retained during his whole tenure of office.[5] His commanding appearance, his air of infinite wisdom, his powers of invective and sarcasm,[6] and his very considerable legal and political ability, hypnotized his contemporaries—"he impressed his audience with awe before he opened his lips";[7] for, as Fox said, he looked wiser than any man ever was. Though he was always in favour of measures of relief for the Roman Catholics, he generally supported a high Tory policy—he induced the House to throw out the bills sent up by the Commons in 1780 to disfranchise revenue officers, and to disqualify government contractors from sitting in the House of Commons.

[1] In 1778 Johnson said, "Were I to make a new edition of my Dictionary, I would adopt several of Mr. Horne's etymologies; I hope they did not put the dog in the pillory for his libel; he has too much literature for that," Boswell, Life of Johnson (7th ed.) iv 148-149.

[2] Above 309; Parlt. Hist. xvii 954-956, 967-970; below 484 n. 3.

[3] (1774) 20 S.T. at pp. 312-316.

[4] Charles Butler, Reminiscences i 188-189 says, "particular circumstances caused Lord Thurlow's reply to make a deep impression on the Reminiscent. His lordship had spoken too often, and began to be heard with a civil but visible impatience. Under these circumstances he was attacked in the manner we have mentioned. He rose from the woolsack, and advanced slowly to the place, from which the chancellor generally addresses the house; then, fixing on the duke the look of Jove, when he grasped the thunder;—'I am amazed,' he said in a level tone of voice, 'at the attack which the noble duke has made on me. Yes, my lords,' considerably raising his voice, 'I am amazed at his grace's speech. The noble duke cannot look before him, behind him, or on either side of him, without seeing some noble peer, who owes his seat in this house to his successful exertions in the profession to which I belong. Does he not feel that it is as honourable to owe it to them, as to being the accident of an accident?'"

[5] Butler says, ibid 189-190, that the effect of this speech was to give Thurlow "an ascendancy in the house which no chancellor had ever possessed; it invested him, in public opinion, with a character of independence and honour; and this, although he was ever on the unpopular side of politics, made him always popular with the people."

[6] "He would appear to be ignorant upon the subject in debate, and, with affected respect, but visible derision, to seek for information upon it, pointing out with a kind of dry solemn humour contradictions and absurdities, which he professed his own inability to explain, and calling on his adversaries for their explanation. It was a kind of masked battery, of the most searching questions and distressing observations; it often discomfited his adversary, and seldom failed to force him into a very embarrassing position of defence," ibid 190.

[7] Wraxall, Memoirs i 528.

When the ministry of North fell, Thurlow retained his office as Chancellor—the King refused to have any other Chancellor.[1] He supported the foreign policy of the ministry, and ably defended the correct constitutional doctrine that the Crown can, by virtue of its treaty-making prerogative, cede territory.[2] But he continued to oppose the bills to disqualify contractors from sitting in the House of Commons, and to disqualify revenue officers from voting at elections, as well as Burke's bill for economic reform. When Rockingham died Thurlow adhered to Shelburne, and resigned his office on the formation of the short-lived coalition ministry of Fox and North. But he and Temple advised the King to adopt the course of threatening with his displeasure any peer who voted for Fox's India Bill.[3] On the rejection of the bill the ministry was dismissed, Pitt took office, and Thurlow again became Chancellor.

He remained Chancellor till 1792. But he was jealous of Pitt; and since he considered that the King's favour gave him a secure position, he continued to pursue a political line of his own. From the first he defended Warren Hastings, and he opposed a measure of Pitt's for mitigating the horrors of the slave trade.[4] His unprincipled conduct in 1788, at the time of the Regency Bill, was the cause of his downfall. In order to secure his retention of office in the event of the Prince of Wales becoming regent, he opened a secret negotiation with the Prince, which was discovered by an odd accident. A council had been held at Windsor. At its close the Chancellor's hat was missing. After a considerable search a page produced it, saying: "My Lords I found it in the closet of the Prince of Wales."[5] After this Pitt entrusted the conduct of the Regency Bill in the House of Lords to Camden.[6] But the King recovered; and Thurlow, having got early information that this event was likely, declared strongly for the King in the House of Lords. Bursting into tears as he described the King's condition and his own loyalty and gratitude, he closed his speech with the words—"When I forget my King, may my God forget me."[7] "Forget you!" exclaimed Wilkes, who was standing on the steps of the throne, "he will see you damned first!" "Forget you," said Burke, who was also among the listeners, "the best thing that could happen to you." Pitt, who was standing a few paces from

[1] Lecky, History of England vi 127-128; cp. Rockingham Memoirs (ed. Albemarle) ii 451-464.
[2] Vol. x 374.
[3] Ibid 111-112; see the memorandum printed in Fox's correspondence (ed. Russell) ii 251-252 which Thurlow delivered to the King, December 1, 1783, which was, Lord Russell thinks, in the handwriting of Thurlow.
[4] Lecky, History of England v. 288.
[5] Ibid 383-384.
[6] Ibid.
[7] Ibid 416.

Thurlow when the ejaculation was made, turning to General Manners exclaimed in a loud voice, "Oh, the rascal." [1] His relations with Pitt continued to grow more and more difficult. In 1788 he was forced by Pitt to appoint Richard Pepper Arden Master of the Rolls.[2] In 1792 he opposed Pitt's bill for the establishment of a sinking fund, with the result that Pitt told the King that he must choose between him and Thurlow.[3] Somewhat to Thurlow's astonishment, the King chose Pitt and dismissed him.[4]

Thurlow survived for fourteen years after his resignation. He continued to support Hastings, and his last triumph was the verdict of acquittal on all counts which he had advocated with all his rough and skilful eloquence. In his new position as a member of the Opposition he ingratiated himself with the Prince of Wales, and in 1795 opposed the government's treason and sedition bills. In 1799 he still continued to support the slave trade. But his appearances in the House of Lords grew more and more infrequent. His last speech in that House was delivered in 1802 on the treaty of Amiens. He died September 12, 1806, and was buried in the Temple Church. He was never married. He openly lived with a mistress, who (according to Hickey) [5] was the bar-maid at Nando's, by whom he had a son and three daughters, to whom he was much attached. He also did well by his brothers.[6] Though he neglected his fellow-student and admirer Cowper,[7] he did not forget his classical learning, and by no means despised literature.[8] He befriended, amongst others, Crabbe and Johnson. Indeed Johnson and he had a considerable respect for each other's not dissimilar mental gifts and conversational powers. Thurlow's sway at Nando's was won and retained by arts not dissimilar to those by

[1] Lecky, op. cit. v 416-417.

[2] Kenyon notes in his Journal (printed Campbell, Chancellors v 677) under June 19, 1788, "with Mr. Pitt, by his desire, on the great coolness between him and the Chancellor, on Arden being made Master of the Rolls against the Chancellor's inclination."

[3] Ibid 288-289.

[4] In advising Scott, the attorney-general, not to resign because he had been dismissed, Thurlow said, "stick by Pitt. He has tripped up my heels, and I would have tripped up his if I could. I confess I never thought the King would have parted with me so easily," Campbell, Chancellors v 609; but his defeat by Pitt in the matter of the appointment of Pepper Arden might have taught him that Pitt's influence with the King was greater than his own.

[5] He says, "The Bar-maid at Nando's (see above 316) was *cherami* of Mr. Thurlow, with whom she continued all her life, and was by many supposed to have been his wife. She bore him two daughters, both now women, and well married, he having left them large fortunes," Memoirs i 59; this is corroborated by Cradock, Memoirs i 71.

[6] For one he obtained successively the large living of Stanhope, the Mastership of the Temple, the Deanery of Rochester, the Deanery of St. Paul's, the Bishopric of Lincoln, and the Bishopric of Durham, Campbell, Chancellors v 660.

[7] Ibid 645-648. [8] Ibid 638-641, 650-656.

which Johnson ruled the Club ; [1] and Johnson said that he would prepare himself for no man in England but Thurlow—" when I am to meet him I would wish to know a day before." [2] Though his formidable qualities procured for him the nickname of " the Tiger," though practitioners complained of his petulance and ill temper,[3] " no man could at times appear more pleasing, affable, and communicative in conversation ; " [4] and with his intimate friends, and after he had dined, he could even be gay.[5]

Thurlow's reputation amongst his contemporaries as a statesman and a lawyer was prodigious. Though they were not blind to his defects—his intractable temper, his ferocious manner and speech, his procrastination in dealing with the business of his court [6]—his formidable appearance and still more formidable rhetorical powers procured for him an admiration which was not unmixed with awe.[7] The best evidence of the feelings with which he was regarded is Lord Campbell's account of the impression which he made upon him when he appeared in the House of Lords in 1801, to support a divorce bill promoted by a wife on account of the incest of her husband with her sister. Campbell says : [8]

When I was admitted below the bar, Lord Chancellor Eldon was sitting on the wool sack; but he excited comparatively little interest, and all eyes were impatiently looking round for him who had occupied it under Lord North, under Lord Rockingham, under Lord Shelburne, and under Mr. Pitt. At last there walked in supported by a staff, a

[1] Cradock, Memoirs i 73-74 compares them, and admits that he was more frightened by Johnson than by Thurlow.

[2] Boswell relates that Johnson said of Thurlow when he was at the bar, " I honour Thurlow, Sir ; Thurlow is a fine fellow ; he fairly puts his mind to yours," Life of Johnson (7th ed.) v 47 ; and, after he had become Chancellor, Johnson said, " I would prepare myself for no man in England but Lord Thurlow. When I am to meet with him, I should wish to know a day before," ibid v 209.

[3] " The practisers complain of the petulance and illiberal treatment they frequently meet with, and the surliness and ill nature which is often to be seen in public ; and those who remember the patience and good humour and politeness of Lords Hardwicke and Camden are perpetually drawing comparisons by no means favourable to Thurlow," Wynne, Strictures on the Lives and Characters of eminent Lawyers 12.

[4] Wraxall, Memoirs i 529-530 ; Cradock, Memoirs i 73, says that " he was more cautious of speaking offensively amongst inferiors than amongst the great, when he sometimes seemed to take a peculiar pleasure in giving proof of his excessive vulgarity."

[5] The well-known tale, ibid ii 473, of how Thurlow, Pitt, and Dundas, returning from Addiscombe one night after dinner, and " elevated above their usual prudence," rode through an open toll gate between Tooting and Streatham, and were shot at by the toll keeper, illustrates this.

[6] Wynne, op. cit. 7-8 ; Wraxall, Memoirs i 528-529 ; Pitt said of him that in Council " he proposed nothing, objected to everything, and acquiesced in anything," Butler, Reminiscences i 190 n. ; and Wraxall, loc. cit., says that in the discussions after the ministerial dinners, he " would frequently refuse to take any part. He has even more than once left his colleagues to deliberate, while he sullenly stretched himself along the chairs, and fell, or appeared to fall, fast asleep."

[7] Above 318. [8] Chancellors v 473-476.

figure bent with age, dressed in an old fashioned grey coat—with breeches and gaiters of the same stuff—a brown scratch wig—tremendous white bushy eyebrows—eyes still sparkling with intelligence—dreadful " crows feet " round them—very deep lines in his countenance—and shrivelled complexion of a sallow hue. . . . The debate was begun by His Royal Highness the Duke of Clarence, afterwards William IV, who moved the rejection of the bill, on the ground that marriage had never been dissolved in this country, and never ought to be dissolved, unless for the adultery of the wife—which alone for ever frustrated the purposes for which marriage had been instituted. Lord Thurlow then rose, and the fall of a feather might have been heard in the House while he spoke. . . . I cannot now undertake to say whether there were any *cheers*, but I well remember that Henry Cowper, the time honoured Clerk of the House of Lords, who had sat there for half a century, came down to the bar in a fit of enthusiasm, and called out in a loud voice " Capital ! Capital ! Capital ! " Lord Chancellor Eldon declared that he had made up his mind to oppose the measure, but that he was converted ; and ex-Chancellor Lord Rosslyn [1] confessed that the consideration which had escaped him—of the impossibility of a reconciliation—now induced him to vote for the bill.

But time has dealt hardly with Thurlow's reputation.[2] As a politician he was unscrupulous and self-seeking ; and it is impossible not to admit that there is much truth in the earl of Albemarle's estimate : [3]

He looked like absolute wisdom, and he spoke like absolute sincerity. But the wisdom of Thurlow seldom looked beyond the hour of his next visit to the royal closet, and the eloquence of Thurlow rarely aspired beyond discomforting an opponent or securing a majority on a division.

As a Chancellor, Charles Butler, though he said that his " speeches from the bench . . . were strongly marked by depth of legal knowledge and force of expression, and by the overwhelming power with which he propounded the result," admitted that " they were too often enveloped in obscurity, and sometimes reason was rather silenced than convinced." [4] The truth is that Thurlow had the capacity to become a great lawyer, but lacked the application and industry, without which no great lawyer can ever be made. He could get up a case, and state his opinion with force and acuteness. But he never tried to master, as Hardwicke and Eldon mastered, the principles of equity as a system. It was notorious that in cases which

[1] Wedderburn, Lord Loughborough.

[2] Campbell, op. cit. v 476, says that all Thurlow's contemporaries with whom he had conversed " entertained the highest opinion of what they denominated his gigantic powers of mind " ; but that he had come to the conclusion that " although he certainly had a very vigorous understanding, and no inconsiderable acquirements . . . he imposed by his assuming manners upon the age in which he lived."

[3] Rockingham Memoirs ii 450.

[4] Reminiscences i 133 ; and see below 323 n. 8 for a similar criticism passed by Hargrave on one of his decisions ; Wynne, op. cit. 8, considered that as a lawyer he was inferior to Yorke, De Grey, Grantly, Ashburton, and Lord Loughborough.

demanded learning and research he relied on Kenyon [1] and on the able and industrious Hargrave.[2] Cradock tells us [3] that an old companion of his would sometimes say to him: "I met the great Law Lion this morning going to Westminster, and bowed to him, but he was so busily reading in the coach what his Provider had supplied him with that he took no notice of me." Hargrave's and Thurlow's joint efforts to establish and maintain the true doctrine of the rule in *Shelley's Case*, and Thurlow's repudiation of Hargrave's assumption of too much credit for upholding the true faith, have been described in a classic passage of one of Lord Macnaghten's most learned and witty judgments.[4] Nevertheless, though Thurlow is rather a political than a legal Chancellor, though some of his decisions have been overruled by his successors, it was inevitable that a man of his abilities and powers of exposition should leave his mark upon the development of equitable doctrine. A rapid glance at one or two of his decisions will show that some of them are still accounted as landmarks in the history of equity.

The case of *Middleton v. Spicer* [5] established the principle that, on the death of a person intestate and without next-of-kin, the Crown was entitled to his undisposed of equitable interests in personalty as *bona vacantia*. But it should be noted that, though the conclusion reached was correct, it illustrates Thurlow's imperfect mastery of principle; for he failed at first to distinguish between the principle applied in the case of *Burgess v. Wheate* [6] and that applied in this case,[7] and, on further consideration, he did not state the distinction very clearly.[8] The case of *Sloman v. Walter* [9] extends the principle of *Peachy v. Duke of Somerset*,[10] from the case where the penalty of a bond is to secure only the payment of a sum of money, to the case

[1] For Kenyon see below 576-583.

[2] Cradock, Memoirs i 79-80 says, "from a well-placed confidence in Mr. Hargrave, who was indefatigable in his service, he had occasion to give himself less trouble than any other man in that high station"; and he adds that, "Hargrave frequently rummaged a whole day to furnish his master with a strong authority or a case in point—for which services Thurlow paid him well"; for Hargrave see below 410-411.

[3] Memoirs i 80.

[4] Foxwell v. Van Grutten [1897] A.C. at pp. 670-671; Hargrave, Jurisconsult Exercitations iii 313-370, 456-457; at p. 316 Hargrave says that his essay on the subject in his Law Tracts 551-578 originated in conversations he had had with Thurlow; from his correspondence, and his account of his conversations with Thurlow, it seems that he and Thurlow differed mainly in the views they held of Blackstone's judgment in Perrin v. Blake—Thurlow holding and Hargrave denying that the true doctrine was there distinctly laid down.

[5] (1780) 1 Bro. C.C. 201.

[6] (1757-1759) 1 Eden 177; above 301-302.

[7] 1 Bro. C.C. at pp. 204-205.

[8] Ibid at p. 205; as Hargrave said, Jurisconsult Exercitations i 393-395, it is difficult to understand the exact grounds on which he based his decision, and whether or not he approved of the decision in Burgess v. Wheate.

[9] (1783) 1 Bro. C.C. 418.

[10] (1721) 1 Stra. 447; above 210.

when it is to secure the performance of other acts. In such cases equity would grant an injunction against an action for the recovery of the penalty, and would send the issue *quantum damnificatus* to be tried by a jury.[1] The case of *Ancaster v. Mayer*[2] re-asserted the two principles that the personal estate of a deceased person is the primary fund for the payment of his debts, even though the real estate is charged with these payments; and that if an estate, subject to a mortgage, is purchased by a testator, that estate is primarily liable to pay the mortgage debt. The two cases of *Fletcher v. Ashburner*[3] and *Ackroyd v. Smithson*[4] went a long way towards the settlement of the leading principles of the doctrine of conversion. The latter case, which lays down the rule as to the effect of a failure of a trust for conversion, is remarkable, not so much for the judgment as for the argument of John Scott, the future Lord Eldon, which revolutionized the current ideas on this topic, and put the law on a logical basis.[5] Thurlow's decision, which he took three days to consider, shows that he could recognize and give effect to a fine argument.[6] The case of *Ashburner v. Macguire*[7] is a leading case upon the various species of legacies, and upon the ademption of specific legacies. The case of *Fox v. Mackreth*[8] amplifies the principle laid down in the case of *Keech v. Sandford*[9]—a trustee for sale who buys the estate and then sells it for an enhanced price, is a trustee of the profit which he has made. The case of *Scott v. Tyler*[10] is a not wholly unsuccessful attempt to state the confused rules as to the validity or invalidity of conditions in restraint of marriage.

But the greatest development in equitable doctrine during Thurlow's chancellorship was made in connection with the proprietary position of married women. It was still recognized that a settlement in fraud of the marital rights of the husband was void.[11] But the case of *Strathmore v. Bowes*[12] makes it clear that to set aside a settlement on this ground, there must have been active concealment or misrepresentation amounting to fraud; for "a conveyance by a woman before marriage under whatever circumstances made, and though but the moment before marriage, is *prima facie* a good conveyance, and can be

[1] 1 Bro. C.C. 418.
[2] (1784) 1 Bro. C.C. 454.
[3] (1779) 1 Bro. C.C. 497.
[4] Ibid 503.
[5] Twiss, Life of Eldon i 119.
[6] At a later date, when Scott proposed to argue the contrary thesis before Dunning, the Vice-Chancellor of Lancaster, Dunning refused to hear him, saying that he had read his argument in Ackroyd v. Smithson, and that he defied him or any man in England to answer it, ibid 119-120.
[7] (1786) 2 Bro. C.C. 108.
[8] (1787) 2 Bro. C.C. 400.
[9] (1726) Cas. t. King 61; above 211-212.
[10] (1788) 2 Bro. C.C. 431.
[11] For the earlier history of this idea see vol. v 312; vol. vi 644-645.
[12] (1789) 2 Bro. C.C. 345.

avoided only by a fraud." [1] The case of *Hulme v. Tennant* [2] made it clear that the separate estate of a married woman could, if she so intended, be made liable by her for the payment of her debts; but that she could not make herself personally liable for her debts.[3] But this decision, and the later case of *Pybus v. Smith*,[4] brought into strong relief a fact which had emerged in earlier cases [5]—the fact that the married woman needed some protection against persuasion by her husband and others to use her powers of disposition in an imprudent way. In the case of *Pybus v. Smith* she had conveyed the whole of her property as security for the payment of her husband's debts. Lord Thurlow tried to find some principle by means of which he could protect the wife from the consequences of her act. At first he thought that the direction given by the settlement in that case to the trustees to pay *from time to time* as she should appoint, might make it impossible "for her to make a sweeping appointment of the whole." [6] But he reluctantly came to the conclusion that he could not so hold; for, as he said, "a *feme covert* had been considered by the Court, with respect to her separate property, as a *feme sole*." [7] He added, however, that "if it was the intention of a parent to give a provision to a child in such a way that she cannot alienate it, he saw no objection to its being done; but such intention must be expressed in clear terms." [8] Thurlow acted upon this opinion when he inserted in Miss Watson's settlement, of which he was a trustee, the words "and not to be paid by anticipation." These, Lord Eldon said, were Thurlow's own words; and he added that he had had much conversation with Thurlow upon the subject.[9] But Thurlow never had the chance to pronounce judicially upon the validity of this restraint upon anticipation. However, its validity was accepted by his successors; and in 1817 Lord Eldon said that it was then too late to contend that it was invalid.[10]

[1] (1789) 2 Bro. C.C. at p. 351 n. (2). [2] (1778) 1 Bro. C.C. 16.

[3] "I believe there is no instance of a personal decree against a *feme covert* for payment of any sum whatever," ibid at p. 21; Lord Eldon doubted the correctness of the decision on the ground that there was no formal appointment by the wife as required by the settlement, see Jones v. Harris (1804) 9 Ves. at p. 493; Parkes v. White (1805) 11 Ves. at pp. 221-223; 1 Bro. C.C. 16 n. (1); but his doubts did not prevail, ibid.

[4] (1791) 3 Bro. C.C. 340. [5] Above 276.

[6] Pybus v. Smith (1790) 1 Ves. at p. 194.

[7] 3 Bro. C.C. at p. 346. [8] Ibid at p. 347.

[9] Brandon v. Robinson (1811) 18 Ves. at p. 434; cp. Jones v Harris (1804) 9 Ves. at p. 494; Parkes v. White (1805) 11 Ves. at pp. 221-222; and on the whole subject see Hart, The Origin of the Restraint upon Anticipation, L.Q.R. xl 221-226.

[10] In Jackson v. Hobhouse (1817) 2 Mer. at pp. 487-488, Lord Eldon, after mentioning the clause inserted by Thurlow into Miss Watson's settlement, said that Lord Alvanley thought it a valid clause, and that it had been so considered ever since —"it is too late now to contend against the validity of a clause in restraint of anticipation."

In fact, this great exception to the principle that the owner of property cannot be prevented from alienating it freely, can be justified both on technical and on substantial grounds. On technical grounds, because the separate property of a married woman was the creature of equity; and, as both Hardwicke and Thurlow held, equity could "act upon its own creature,"[1] and mould the incidents of this new species of equitable property as it pleased.[2] On substantial grounds, because it had been for some time apparent that the large powers which the married woman had over her separate property could be so used as to destroy the main object of the institution of separate property—the securing of a proprietary independence for the wife.[3] It is for this reason that the Legislature, when it gave proprietary independence to married women, allowed the restraint upon anticipation to be attached to the statutory separate property which it had created.[4]

Some of the cases which came before Thurlow reflect the changes which the Industrial Revolution was beginning to make in economic conditions. Thus in one case an injunction was issued to restrain the defendant from preventing the flow of water to a mill,[5] and in another relief on terms was given from the obligations of a lease of a coal mine which it was no longer profitable to work.[6] Other cases turn upon the political events of the day. The troubles of the American loyalists, whose estates had been forfeited, gave rise to two applications to the court.[7] It was found to be necessary to draw up a new scheme

[1] This was Hardwicke's expression in Oldham v. Hughes (1742) 2 Atk. at p. 454; above 266.

[2] Lord Eldon said that Thurlow "did not attempt to take away any power the Law gave her, as incident to property, which, being a creature of Equity, she could not have at Law: but, as under the words of the settlement it would have been her's absolutely, so that she could alien, Lord Thurlow endeavoured to prevent that by imposing upon the trustees the necessity of paying to her from time to time, and not by anticipation; reasoning thus: that Equity making her the owner of it, and enabling her, as a married woman, to alien, might limit her power over it: but, the case of a disposition to a man, who, if he has the property, has the power of aliening, is quite different," Brandon v. Robinson (1811) 18 Ves. at pp. 434-435.

[3] Above 276, 324-325; in Jones v. Harris (1804) 9 Ves. at pp. 493-494 Lord Eldon said, "in *Pybus v. Smith* the Court, settling the property, in order to protect it, with all the anxious terms then known to conveyancers, in a day or two afterwards, while the wax was yet warm upon the deed, the creditors of the husband got a claim upon it by an informal instrument; and the same Judge, who had made such efforts to protect her, was upon authority obliged to withdraw that protection."

[4] 45, 46 Victoria c. 75, § 19; *In re* Lumley [1896] 2 Ch. 690. In 1935 (25, 26 George V c. 30) the Legislature abolished the separate property of married women, and therefore the restraint upon anticipation; the protection formerly given by such a restraint must now be sought in the machinery of a protective trust; but the operation of such a trust, though in some respects more extensive, is in other respects less extensive, than the restraint upon anticipation.

[5] Robinson v. Lord Byron (1785) 1 Bro. C.C. 588.

[6] Smith v. Morris (1788) 2 Bro. C.C. 311—a decision of Kenyon M.R.

[7] Kempe v. Antill (1785) 2 Bro. C.C. 11; Wright v. Nutt (1791) 3 Bro. C.C. 326.

for the administration of a trust to convert infidels in Virginia, since there were no more infidels to convert; and, since William and Mary College and Harvard College, which had administered the trust, were now aliens and therefore not subject to the control of the court, new trustees were appointed.[1] The case of *the Nabob of Arcot v. The East India Co.*,[2] raised the question whether the dealings between an Indian Prince and the Company were matters which could be properly dealt with by a municipal court—a problem which turned upon the international status of the Indian Princes and the Company respectively.

Though some of Thurlow's decisions have been overruled,[3] his strong sense and his legal abilities generally led him to the right conclusion. But often he did not trouble to discuss at length the legal problems which had been argued by the opposing counsel. Lengthy and elaborate arguments are followed by very short judgments.[4] At the latter part of his career he often handed over the heavy cases to a deputy—to his Master of the Rolls, or, after Pepper Arden, whom he disliked,[5] was made Master of the Rolls, to Buller, J.[6]

Thurlow's defects as a Chancellor, which resulted from his want of steady industry and application, and his defects as a statesman, which resulted from his selfishness and cynicism, were partially concealed from his contemporaries by his commanding presence and his powers as an orator and a debater. But disguises of this kind die with the person. The verdict of posterity must be that, though his intellectual and physical qualities gave him the opportunity of becoming the very great man that many of his contemporaries imagined him to be, his moral shortcomings prevented him from taking that opportunity.

During this period there were three Masters of the Rolls. Thomas Sewell[7] held office from 1764 till his death in 1784. He had had a large practice at the Chancery bar; but his appointment was somewhat of a surprise to the profession, since it was expected that the post would be offered to Sir Fletcher Norton,[8] the attorney-general. He was a very capable judge, and his learning helped to remedy some of the deficiencies of Lord Chancellor Bathurst.[9] Horace Walpole tells us that he decided

[1] Attorney-General v. Mayor of London (1790) 3 Bro. C.C. 171.
[2] (1791) 3 Bro. C.C. 292.
[3] E.g. Thronton v. Dixon (1791) 3 Bro. C.C. 199; Wright v. Nutt (1791) ibid at p. 340 n.
[4] See e.g. Davidson v. Foley (1787) 2 Bro. C.C. 203; Pierson v. Garnet (1787) ibid 226; Cator v. Earl of Pembroke (1787) ibid 282; Hanbury v. Hanbury (1788) ibid 352.
[5] Above 320. [6] Below 488-492. [7] Foss, Judges viii 366-368; D.N.B.
[8] Below 560-562. [9] Above 313-314.

a case of his in the court of Chancery in two months after it had been begun [1]—few litigants at this period were so fortunate. He was succeeded in 1784 by Lloyd Kenyon of whose career I shall speak later.[2] Kenyon was a very accomplished lawyer. He had had a large practice both in the common law courts and the court of Chancery, so that he was a master of the rules both of law and equity. His industry was immense; and he had an extraordinary capacity for arriving quickly at the correct solution of legal problems. Both as a counsel and as a judge he showed this capacity; and in this respect he was a great contrast to Lord Eldon. But whereas Eldon gave elaborate reasons for his opinions Kenyon rarely troubled to do so. He was contented to decide the case as soon as he had heard it, and to state the reasons for his opinion as shortly as possible.[3] Both as Master of the Rolls and as Chief Justice he adhered closely to precedent, even if he disagreed with the rule established by it.[4] Of the large number of his decisions as Master of the Rolls, which were seldom overruled,[5] perhaps the two best known are *Lawes v. Bennett* [6] and *Gee v. Audley* [7]

On Kenyon's appointment as Chief Justice of the King's Bench in 1788, in succession to Lord Mansfield, Richard Pepper Arden [8] was made Master of the Rolls—much against the wish of Thurlow.[9] Arden had had a distinguished career at Manchester Grammar School, and at Trinity College, Cambridge. He graduated twelfth wrangler in 1766, and became a fellow of Trinity in 1769. He was called to the bar in 1770. Both his intellectual and his social qualities helped him, in spite of his physical disadvantages,[10] to succeed at the bar. In 1776 he was made a

[1] Letters (ed. Toynbee) xi 3, 9. [2] Below 576-583.

[3] "It was," said Eldon, "his rule to consider himself as only required to read the case, as it was stated to him, and to give such opinion as his general knowledge enabled him to give upon reading it, without looking for further information as to matters of law, by looking into books. When he afterwards became a judge in equity, the rule by which he governed himself, as to the facts of any case, was to consider himself as not bound to seek for further information as to those facts, than as the diligence of counsel had stated them; and his judgment was usually given without assisting himself by more than his general knowledge of law enabled him to aid himself, at the conclusion of the counsel's reply. It is due to the very great law-learning of Mr. Kenyon . . . to record that no lawyer in my days could in this way of proceeding do so much justice to parties consulting him, or before him for judgment as he could," Twiss, Life of Eldon, i 136-137, citing Eldon's Anecdote book.

[4] "On the present subject, I yield to the authority of the cases, and not to the reason of them," Stebbing v. Walkey (1786) 2 Bro. C.C. at p. 86; below 580.

[5] Two instances in which his decisions were not followed were Halfhide v. Fenning (1788) 2 Bro. C.C. 336, and Moffat v. Farquharson (1788) ibid 338.

[6] (1785) 1 Cox 167. [7] (1787) 1 Cox 324.

[8] Foss, Judges viii 229-234; Townsend, Twelve Eminent Judges i 129-161; Wynne, Strictures on the Lives and Characters of eminent Lawyers 52-53; D.N.B.

[9] Above 320; below 329.

[10] Wraxall, Memoirs ii 458, says, "nature has seldom cast a human being in a less elegant or pleasing mould. Even Dunning's person would have gained by comparison with Arden."

judge of the South Wales circuit, and in 1780 he took silk. His further promotion he owed to Pitt. His acquaintance with Pitt he owed to the fact that both had chambers on the same staircase in Stone Buildings, Lincoln's Inn. Pitt and Arden became firm friends; and it is said that Arden's conversation was so entertaining that Pitt, when they met at dinner, always insisted on sitting next to him. Thurlow, in whose court he practised, always disliked him; but in 1782 Pitt insisted upon his being appointed solicitor-general; and in 1784 he succeeded Kenyon as attorney-general and Chief Justice of Chester. In 1788 he succeeded Kenyon as Master of the Rolls, in spite of Thurlow's opposition, which was only overcome by an appeal to the King.[1] Though Arden's judicial manner was sometimes flippant, and though he had a quick temper "which went far to justify the Frenchman's translation of his name *Mons. Poivre Ardent*," he proved to be a very able judge. A good specimen of his learning is his judgment in the *Thellusson Case*.[2] He bore Thurlow's hostility with patience, never retaliated, treated his decisions with respect, and even, on one occasion, defended him in the House of Commons.[3] When Eldon was made Lord Chancellor in 1801 Arden succeeded him as Chief Justice of the Common Pleas, and was raised to the peerage with the title of Lord Alvanley. Though he occasionally had some altercations with the serjeants, he proved to be as able a Chief Justice as he had been a Master of the Rolls. He died in 1804—popular and respected; for, except Lord Thurlow, he never had an enemy.

The development of equity, during the eighteenth century, into a fixed system of principles and rules, naturally raised the question of its relation to the law. The fact that equity had been developed in a separate court, which employed a procedure and acted on principles which were quite distinct from the procedure and principles of the courts of common law, was, as we have seen,[4] the characteristic which distinguished equity in England from equity in continental countries and in Scotland. It is true, as we have seen,[5] that in one or two cases the Legislature had introduced ideas originating in the court of Chancery into the common law. But, subject to this very slight modification, the systems of law and equity were separate, though by no means contradictory, systems; for we have seen that

[1] Townsend, op. cit. i 147, says that a warrant was being prepared to put the seals into commission; Wynne, op. cit. 52, says that his appointment was "notoriously in the teeth of an authority which had often been disputed but never before vanquished"; the fact that he commanded six votes in the House of Commons, ibid 53, no doubt helped him.

[2] (1799) 4 Ves. at pp. 328-340. [3] Townsend, op. cit. i 148-149.

[4] Vol. i 446; see above 267 for Lord Hardwicke's appreciation of this peculiarity.

[5] Vol. xi 593; below 584.

from the first equity necessarily followed the law;[1] and the courts of common law and the court of Chancery had come to a somewhat complex, and to the suitor an often expensive *modus vivendi*, which enabled them to work together as partners.[2] In the latter half of the century, the question whether this sort of relationship between law and equity was the most satisfactory that could be devised, was raised. We shall see that the question was discussed in a correspondence between Lord Hardwicke, and the Scottish lawyer Lord Kames who advocated the continental and Scottish plan, according to which law and equity were administered together in the same court.[3] Lord Hardwicke preferred the English system;[4] and there is no doubt that the majority of English lawyers agreed with him. They favoured the system which, though complex, was workable and well understood both by the common law and by the equity judges and practitioners. But there was one notable exception. We shall see that Lord Mansfield, together with some of his puisne judges, took the contrary view.[5] Lord Mansfield preferred the Scottish system; and his attempt, when he became Chief Justice, to bring about a fusion between the substantive principles of law and equity, would, if it had succeeded, have changed the course of English legal history.[6] But I cannot relate the history of the conflict between these rival views as to the relations of law and equity, or deal with the effects of the rejection of Lord Mansfield's views, until I have related the history of the professional development of the common law during this century, and more especially its development during the long period covered by Lord Mansfield's tenure of the office of Chief Justice of the King's Bench.

IV

The Common Law

With the history of many of the branches of the common law during this century, I have already dealt in the preceding Book of this History, and in the two first chapters of this Book. At this point I must say something of the manner in which the common law as a whole was developed by the lawyers, and of the results of that development during this century. I shall deal first with the literature of the common law. Secondly I shall say something of the Chief Justices and other lawyers who helped to develop it down to 1756, when Lord Mansfield

[1] Vol. iv 280-283.
[2] Vol. iv 668-671; below 601-602.
[3] Below 583-584, 600.
[4] Below 584, 600.
[5] Below 584-585, 588-589; see above 302-304.
[6] Below 557-558, 588-589.

became Chief Justice of the King's Bench. Thirdly, I shall give some account of Lord Mansfield, who was the greatest of the common lawyers in this century, and one of the greatest lawyers in our legal history. Under this head I shall give an account of the career and character of Mansfield; of the puisne judges who sat with him and helped him in his great work of developing English law; of the contribution which he and his puisne judges made to the development of the law; and of Mansfield's influence upon the future development of English law. Lastly, I shall say something of Mansfield's contemporaries and successors.

The Literature of the Common Law [1]

As in the preceding period,[2] the literature of the various topics which fall under the heading "common law" is far more bulky than the literature of equity,[3] or the literature of those topics which fall within the sphere of the civilians' practice.[4] Nor is this surprising. Since the Great Rebellion and the Revolution had, as Holt, C.J., said, established the common law as "the over-ruling jurisdiction in this realm," [5] it follows that the variety of the topics which fall under the rubric "common law" far surpasses the variety of the topics which fall under any other rubric. The common law almost monopolized all the departments of public law and criminal law; and the topics of private law, which were wholly outside its sphere, were comparatively few. The literature of the common law, therefore, is varied and extensive. Much of it is purely practical and utilitarian; but there are a few great books the value of which is permanent. The greatest book of all is Blackstone's Commentaries, with which I shall deal separately in the last section of this chapter.[6]

This literature possesses many of the characteristics which marked the literature of the preceding period. The older topics—practice procedure and pleading, the criminal law, and the land law—continue to be well represented. But new characteristics are emerging. There are more books upon various topics of commercial law, and some of these books are taking their modern shape. They are definitely law books, and not books which give miscellaneous information useful to merchants,

[1] For the literature of the common law, as for the literature of equity, Sweet and Maxwell's Bibliography of English Law vol. ii, compiled by Leslie F. Maxwell, will be found a good guide.

[2] Vol. vi 613. [3] Above 179-193. [4] Below 606-646.

[5] "The common law is the over-ruling jurisdiction in this realm: and you ought to intitle yourselves well, to draw a thing out of the jurisdiction of it," Shermoulin v. Sands (1698) 1 Ld. Raym. at p. 272.

[6] Below 711-736.

amongst which legal information is included.[1] There are signs that the topics of contract and tort will become topics as separate as the land law and the criminal law.[2] There are many more books upon special topics.[3] As in the preceding period,[4] I shall group this literature under certain heads, and say something of the character of the books which fall under each of them. These heads are :—(i) Public Law ; (ii) Civil Procedure and Pleading ; (iii) Criminal Law and Procedure ; (iv) Evidence ; (v) The Land Law and Conveyancing ; (vi) Commercial Law ; (vii) Tort and Contract ; (viii) Special Branches of the Law ; (ix) Legal History ; (x) Students' Books on English Law, Roman Law, and Legal Theory.

(i) *Public Law.*

The literature on this topic falls into three well-marked groups—local government, central government, and colonial government.

Local government.—A large literature centres round the different persons and bodies entrusted with the conduct of local government. Because the justices of the peace were by far the most important officials of the local government, the literature which centres round them is much the most extensive. But, besides this literature, there are also books on sheriffs, coroners, constables, bailiffs, courts leet, and the parish ; and the fact that special books were being written about the poor law shows that it was becoming a special topic of local government law.

The best of the books on the justices of the peace is the Rev. Richard Burn's treatise, of which I have given some account.[5] Burn was born at Winton in Westmoreland in 1709, and was educated at Queen's College, Oxford. He was vicar of Orton in Westmoreland and a justice of the peace for the counties of Westmoreland and Cumberland. In 1765 he was made Chancellor of the diocese of Carlisle. He died in 1785.[6] Burn was a learned lawyer and antiquarian. He edited the ninth, tenth, and eleventh editions of Blackstone's Commentaries, and he helped to write a history of the counties of Westmoreland and Cumberland. But his two greatest books—his book on ecclesiastical law and his book on the justices of the peace—were upon branches of the law which he had helped to administer. Of his book on ecclesiastical law I shall speak later.[7] The best proof that his book on the justices of the peace was accepted as the leading text-book on that topic is the number

[1] Below 387-391. [2] Below 391-392. [3] Below 392-402.
[4] Vol. vi 598. [5] Vol. x 145, 161-162.
[6] D.N.B. [7] Below 612-613.

of editions through which it has passed. It was first published in 1755 in two thin octavo volumes; it passed through fifteen editions in Burn's lifetime; and it reached its thirtieth edition in 1869. Under the hands of its various editors it expanded from two thin to six stout octavo volumes.

It deserved its success. Burn carefully abridged the statutes, and stated the manner in which their clauses had been interpreted by the courts.[1] His treatment of the criminal law was based upon a thorough study of the works of Coke, Hale, and Hawkins; and upon such reports as were available which, as he said, were of varying degrees of authority.[2] The earlier books on the justices of the peace, which had been written by Fitzherbert Crompton Lambard and Dalton, he regarded as books of authority, and he made considerable use of them; but he made very sparing use of later books.[3] In all cases he cited, where possible, authority for his statements. In his method of arranging his material he made considerable improvements. The main arrangement was alphabetical, but the alphabetical headings were better chosen. "Thus the laws relating to the *game* which are above forty in number, and are interspersed in the common books under about thirteen different titles, are here digested under one general title *Game*." [4] By pursuing this method he was able to bring together all the statutes relating to a particular subject, and to state their effect; and he was also able to save the reader the trouble of referring from one title to another, and of so "losing the thing to be treated of betwixt them." [5] But the adoption of this plan necessitated a more intelligent arrangement of the contents of these general titles. The main principle of his arrangement was chronological. Thus in dealing with the topic of *Rates* he begins with assessment, goes on to the allowance of the rate and its publication, and then deals with appeals, distress, and commitment when no distress could be had. If the chronological arrangement was not possible he begins by giving a general definition and then explains its several parts.[6] That

[1] "As to the statutes at large . . . the author hath by no means thought himself at liberty, as Mr. *Dalton* and others have done, to deliver the import thereof in his own words, but hath constantly abridged the Act in the words of the Act itself, leaving out as little as possible which may seem in any way material. And to each distinct clause he hath annexed the interpretation thereof, where the same hath been determined in the court of king's bench, or expounded by other good authority," Preface to the first edition.

[2] Ibid; he says that in "citing of Mr. *Hawkins*, he hath not thought it allowable, as is usual with others, to omit the several degrees of caution and assent, with which he delivereth his opinion . . . which are . . . inserted by him with the utmost deliberation and judgment"; for Hawkins and his book see below 361-362.

[3] Preface to the first edition. [4] Ibid. [5] Ibid.

[6] "When there is no priority in point of time; the next method is that of Lord Coke, to frame a definition which takes in the whole subject, and then explain the several parts of such definition in their order," ibid.

is the method, for instance, in which he deals with the topic of larceny. Finally he was careful to give precedents of legal documents, and "to bring them much nearer to the statutes, upon which they ought to be formed, than usually hath been done." [1] It is not surprising that a book constructed on these lines at once became and long retained its position as the leading text-book on the subject with which it dealt.

Many other books on this topic, small and large, were published both before and after Burn's treatise. Nelson, the Chancery reporter, who was chairman of the Sussex sessions, published a book on this subject in 1704.[2] It was a successful book since it reached a third edition in 1710 and a twelfth edition in 1745. It included information as to the duties of many other officials of the local government. Amongst Giles Jacob's many books was a book on *The Modern Justice* which was first published in 1716 and reached a second edition in 1717-1718.[3] After a very short introduction on the history of the justices, the law is set out under alphabetical headings beginning with "Affray" and ending with "Wrecks." An appendix contains an account of the business of quarter sessions—the chairman's charge, criminal procedure, the procedure in settlement cases, a summary of the statutes relating to the powers of the justices in sessions under alphabetical heads, the statutory powers of mayors of corporations, and the commission of the justices. In 1703 the criminal business of the justices was described by Sir James Astry.[4] He gives a specimen charge to the grand jury, and some account of the offences statutory or otherwise which the jury is asked to present. The editor has prefixed an account of trial by jury, and a disquisition on homicide which is not always accurate.[5] That it was found to be a useful book is shown by the fact that it reached a second edition in 1725. Blackerby's book,[6] which was published in

[1] Preface to the first edition.

[2] The Office and Authority of a Justice of Peace, showing also the duty of Constables, Commissioners of Sewers, Coroners, Overseers of Poor, Surveyors of Highways, Church-wardens, and other Parish Officers. . . . To which are added English Precedents of Indictments, Warrants, etc.

[3] The Modern Justice: containing the Business of a Justice of Peace in all its Parts. An Abridgment of the Common Law, and of the Acts of Parliament relating to Justices of Peace, Constables, and other Parish Officers under them, compleat down to this time, and some Special Cases in Law to illustrate the same. With great variety of the best approved and authentick precedents.

[4] A General Charge to all Grand Juries: with advice to those of Life and Death, Nisi Prius etc. . . . To which is prefixed a Discourse of the Antiquity Power and Duty of Juries.

[5] Thus at p. 21 (2nd ed.) he says, "If one keep a mastiff dog which is used to bite people near the common highway; or bull or beast that hath hurt anyone, if (after notice) they kill anyone, that will be murther in the owner, although not present when the fact was done."

[6] The Justice of Peace his Companion, or a Summary of all the Acts of Parliament, whereby, One, Two, or more Justices of the Peace, are authorized to act, not

1723, was a short summary of the statutes which gave authority to the justices. The statutes are arranged under alphabetical heads. Under each head the statute is very shortly summarized in one column, and the penalty for its breach is stated in the parallel column. The book had many of the qualities of an index, and it was so used, Burn says,[1] by writers of larger books on this topic. A very different style of book was published by Robert Boyd, a Scotch lawyer, in 1787.[2] It deals with both the Scotch and the English Law; and it is remarkable in that it deserted the alphabetical arrangement which was universally adopted by English writers. The law is systematically expounded in four books. It should be noted that the author is loud in his praises of Burn's work. Without its help, he says, his book could not have been written, because the English and Scotch Law are so interwoven that the jurisdiction of the Scotch justices cannot be understood without a knowledge of the jurisdiction of the English justices.

Some of these books on the justices of the peace gave information as to the other officials of local government; and there were also a number of books which dealt specially with some of these officials.

At the beginning of the eighteenth century Dalton's book on the sheriff[3] was still the standard authority on that topic. In 1696 there appeared an anonymous work on this subject, and on the office and duty of coroners, which reached a third edition in 1727.[4] Dalton's book, the author points out, is antiquated, and sometimes wrong; and he stresses the importance of the subject:

> If execution be the life of the law (as without doubt it is) it seems to be seated in the sheriff as in the heart. . . . Original process moves and is directed to him; subsequent proceedings are circulated in him; and at last are finished and completed by him.[5]

Not only the sheriff's duties, but also the duties of under-sheriffs, of bailiffs of hundreds and parishes, and of coroners are discussed; and all parts of the sheriff's duties and powers are

only in but out of Sessions of Peace. Begun by Samuel Blackerby late of Gray's Inn; alphabetically digested, and continued to the end of the last Session of Parliament, 1722. With an Exact Table, by Nathaniel Blackerby.

[1] Preface to the first edition of his Justices of the Peace; it was so used in the later editions of Nelson's book.

[2] The Office Powers and Jurisdiction of His Majesty's Justices of the Peace and Commissioners of Supply.

[3] Vol. iv 119.

[4] The Compleat Sheriff: Wherein is set forth His Office and Authority, with Directions how and in what manner to execute the same. . . . Likewise of Under-Sheriffs and their Deputies, and where the High Sheriff shall be answerable for their Defaults and where not, etc. Together with the learning of bail bonds, returns of writs, escapes, attachment, amerciament, actions on sheriffs' malfeasances and non-feasances, customs of London. To which is added the office and duty of Coroners.

[5] Preface.

dealt with, including such semi-obsolete duties as the holding of the county court and the sheriff's tourn. It is a severely practical book which covers a great deal of ground, and the information is conveyed in a very compressed form. It must have been useful to practitioners and to the officials with which it deals. Coroners had been dealt with in some of the books on the justices of the peace and the sheriff. In 1761 a book dealing only with coroners was written by Edward Umfreville, the senior coroner of Middlesex.[1] The book originated in notes which he had made as to the office of coroner when he was a candidate for the post. After an historical introduction, it deals with those parts of the criminal law which a coroner must know; with the election of coroners, their duties, and causes of removal; and with the practical conduct of the office. The last part of the book is accompanied by a full collection of forms and precedents. Though somewhat diffuse and not very well arranged it is a learned book; and that it was of considerable use to those who were elected to this office is shown by the fact that it reached a second edition in 1822.

In 1754 Saunders Welch published his book on constables. Welch, who was a friend of Dr. Johnson, was high constable of the Holborn Division for nine years,[2] and succeeded Henry Fielding at Bow Street as the first magistrate for Westminster—an office, says Boswell, which "he discharged for many years faithfully and ably."[3] His book, therefore, is founded on great practical experience. It is not a law book—no authorities are cited; but it gives a very clear account of the duties of constables, and valuable advice as to the way in which they should perform their multifarious duties. In the second edition, which appeared in 1758, there is a valuable introduction in which the inadequacy of the existing organization of the constabulary is exposed,[4] and the inefficiency of the ordinary constable is accounted for.[5] Another book on constables was written by that eccentric and pedantic antiquary and man of letters, Joseph

[1] Lex Coronatoria: or, the Office and Duty of Coroners. In three Parts. Wherein the theory of the Office is distinctly laid down; and the Practice illustrated by a full Collection of Precedents formed upon the theory. To which is prefixed an Introduction, giving some account of the Antient State and Dignity of the Office.

[2] Preface to the second edition of his book.

[3] Boswell, Life of Johnson (ed. Hill) iii 216; on the failure of his health Johnson got him leave of absence to travel in Italy without withdrawal of the pension which the government allowed him, ibid iii 216-217; for the office of chief magistrate at Bow Street see vol. x 144, 240; Webb, The Parish and the County, 339-342.

[4] "So low and so contemptible are peace officers become that it has been thought necessary to trouble the king's guards even to convey a poor journey-man taylor to gaol for quitting his master's service, and leaving his work unfinished," Introd. vii.

[5] "Poverty and gross ignorance are too often united in the person of the constable," largely because "the opulent tradesman screens himself by interest from this most necessary and important duty to his country, and meanly throws it upon the indigent and ignorant," ibid xvii.

Ritson.[1] Ritson had practised as a conveyancer, held the post of high bailiff of the liberty of the Savoy, and was called to the bar by Gray's Inn. It is due to these facts that he varied his studies in English literature by publishing in 1791 his tracts on *The Office of a Constable*, *The Jurisdiction of the Court Leet*, and *The Proceedings of the Court Leet of the Savoy*. The book on the office of a constable [2] is intended to be a manual for constables, and was an epitome of a larger unpublished work. It contains a short history of the office, and a short and clear account of the constables' powers, duties, and liabilities. Like Welch, he makes some caustic and just criticisms of the results which followed from the very mediæval manner in which constables were appointed. Ritson also wrote a short tract, which was published after his death, on *The Office of the Bailiff of a Liberty*.[3] It was compiled about the same period as the other three tracts. It is a learned antiquarian tract based mainly on the Year Books and mediæval statutes, with notes of such later statutes as referred to these bailiffs. Though the author states that the subject is not "a matter of mere curiosity or antiquarian research," it can hardly be called a very live subject.

Ritson's books on the court leet,[4] and on the proceedings of the court leet of the Savoy,[5] are books upon legal history rather than books on modern law. His book on the court leet is much more a description of what that court had once been than a description of what it was when he wrote. It is, as Professor Hearnshaw says,[6] "a legal anachronism"—"more valuable as a guide to thirteenth century leet jurisdiction than to the eighteenth." His book on the court leet of the Savoy is a valuable collection of cases decided in the court from 1682 to 1789, grouped under alphabetical heads,[7] together with some

[1] For his curious career see D.N.B.; in 1778 he was "an avowed Jacobite," and he printed tables showing the descent of the Crown in the Stuart line. In 1791, after a visit to Paris, he became a republican, and declared himself an atheist.

[2] The Office of Constable: Being an entirely new Compendium of the Law concerning that Ancient Minister for the Conservation of the Peace. With a Preface and an Introduction containing some account of the Origin and Antiquity of the Office.

[3] It was published in 1811 by the author's nephew Joseph Frank; the editor tells us that the work was left ready for the press by the author.

[4] The Jurisdiction of the Court Leet: exemplified in the Articles which the Jury, or Inquest for the King in that Court, is charged and sworn, and by law enjoined to inquire of and present. Together with approved Precedents and Presentments and Judgments in the Leet; and a Large Introduction containing an account of the origin, nature, and present state of this Institution.

[5] A Digest of the Proceedings of the Court Leet of the Manor and Liberty of the Savoy, Parcel of the Duchy Lancaster in the county of Middlesex. From the year 1682 to the present time.

[6] Leet Jurisdiction in England 41 n. 5.

[7] The heads run from "Aleconners" to "Weights and Measures."

special entries on such topics as amerciaments, appointments of constables, presentments, rules and orders made by the leet jury. A more modern and much more important unit of local government—the parish—was made the subject of a book by Joseph Shaw in 1733,[1] which reached a tenth edition in 1763. It is a useful and clearly written summary of a topic which demanded a knowledge both of ecclesiastical law and of the common law enacted and unenacted. It included such ecclesiastical topics as tithes, church-rates, and dilapidations, and such common law topics as poor relief, highways, and constables.

From the beginning of the century special books on the subject of the poor law began to make their appearance. One of the earliest was written by Samuel Carter, the reporter,[2] in 1710.[3] It is an attempt to state the poor law in a logical form—earlier writers, the author said, had dealt with the subject under alphabetical headings which were "confusedly handled." It is a short summary of the law under fourteen heads.[4] More than half the book is taken up with an appendix containing summaries of the statutes, and precedents of warrants, orders, and certificates. In 1739 Robert Foley wrote a short book on the statutes relating to the poor law from 43 Elizabeth to 3 George II.[5] Parts of the statutes are set out verbatim, and, after each section, there are short notes of the cases which had arisen upon it. It is a slight piece of work, but it was evidently found to be useful since it reached a second edition in 1743. In 1764 Burn published a *History of the Poor Laws: with Observations*.[6] The book is a history, an account of the various pro-

[1] Parish Law: or a Guide to Justices of the Peace, Ministers, Churchwardens Overseers of the Poor, Constables, Surveyors of the Highway, Vestry Clerks, and all others concerned with Parish Business. It contains also forms of warrants and precedents for justices of the peace.

[2] Vol. vi 552, 558.

[3] Legal Provisions for the Poor: or a Treatise on the Common and Statute Laws concerning the Poor, either as to Relief, Settlement, or Punishment.

[4] The heads are: 1. Various kinds of poor. 2. Setting the poor to work; rates and rating. 3. Appeals against rates; other provisions for the poor. 4. Apprenticing children. 5. Liability of relatives to relieve. 6. Workhouses. 7. Settlements. 8. Bastards. 9. Proceedings against fathers or mothers of bastards. 10 and 11. Settlement. 12. Rogues and Vagabonds. 13. Houses of correction. 14. Incorrigible rogues.

[5] Laws relating to the Poor from the forty-third of Queen Elizabeth to the third of King George II. With cases adjudged in the court of King's Bench upon the several clauses of them. The book was finished by the author, but published after his death.

[6] The first chapter of the book gives an account of the maintenance of the poor by the religious houses; the next three chapters deal with the statutes as to servants and artificers, as to vagrants, and as to the impotent poor; the fifth chapter contains some interesting observations on these statutes; the sixth chapter gives an account of Hale's, Josiah Child's, Cary's, Hay's, Alcock's, and other schemes for the reform of the poor laws; chapter seven contains his own proposals for reform; the last chapter contains his suggestions for reform in other branches of the jurisdiction of the justices.

posals made at different periods for the reform of the poor law, and the author's own proposals for the reform both of the poor law and of some other branches of the jurisdiction of the justices of the peace. Like Burn's other works, it is a clear and well arranged account of the subjects with which it deals; but it is more valuable as a criticism, by an exceptionally competent critic, of the defects of the law in his own day, than as a history. All these books show that the poor law was becoming a very special topic of local government law; and this fact is emphasized first by the fact that the poor law was by far the largest title in Burn's *Justices of the Peace*, and secondly by the fact that in the twenty-ninth edition this title was separately edited.

Central government.—The fact that the law of the constitution had been permanently settled on the basis of the Bill of Rights and the Act of Settlement is reflected in the literature on the central government. There is a larger amount of literature on this topic than in the preceding period;[1] and much of it is of a non-controversial type—merely seeking to state the law. It is true that, at the beginning of the century, we hear echoes of the old controversies as to the position of the Crown and its prerogative. It is true also that political events sometimes produced constitutional controversies which were argued, as the constitutional controversies of the seventeenth century had been argued, as matters of law. Thus the rebellion of 1745 produced some questioning of the righteousness of forfeiture for treason, and a book by Charles Yorke in defence of it;[2] there was some controversy as to the Crown's power of impressing seamen;[3] the American war of independence and the events which led up to it produced much controversial literature;[4] and the long duration of Warren Hastings' impeachment raised the question whether or not a dissolution of Parliament terminated an impeachment.[5] But, when all deductions have been made, it is clear, first, that the bulk of the literature on constitutional law is non-controversial, and, secondly, that modern principles of constitutional law are emerging.

In dealing with this literature I shall, in the first place, say something of the books which deal with the constitution as a whole, and, secondly, with the books which deal with particular topics.

(1) Two of the earliest of the first of these classes of books are Giles Jacob's *Lex Constitutionis*,[6] which was published in 1719, and Roger Acherley's *Britannic Constitution*, which was published

[1] Vol. vi 608-609.
[2] Below 362-363.
[3] Below 347.
[4] Vol. xi 105-107, 116-123.
[5] Ibid; in 1791 S. Percival wrote "A Review of the Arguments in favour of the Continuance of Impeachments notwithstanding a Dissolution."
[6] Lex Constitutionis: or the Gentleman's Law.

in 1727. Jacob was out to survey the main features of the constitution; and I think that his book is one of the earliest attempts at such a survey. Acherley, on the other hand, set out to explain the legal theory at the back of the constitutional settlement effected by the Bill of Rights and the Act of Settlement. The two books are related somewhat as Anson's *Law and Custom of the Constitution* is related to Dicey's *Law of the Constitution.*

Jacob in his preface says very truly that there had never been a time in England when the "Original of Government" was so much discussed, and the particular frame of the constitution so little understood. It was his object to describe the frame of the constitution. In one respect the book is somewhat curious. It begins with an introduction to the common law which deals shortly with the elements of the law of real property and criminal law, and has very little connection with the rest of the book. Apparently Jacob considered that these branches of the law could be regarded as giving some account of the rights and duties of the subject.[1] The rest of the book deals in successive chapters with the King and his prerogative; the peerage and the House of Lords; the House of Commons; the great officers of state and of the household; the exchequer and treasury; the commissioners of customs and the officers of that department; the excise; the post office; the stamp office; forfeited estates and the law of forfeiture; the public accounts; the navy and the navy office, the admiralty, and naval discipline; the laws of war, courts martial, articles of war, and the ordnance; the militia and the lords lieutenant; the justices of the peace. It is a learned book—the author tells us that he had consulted nearly a hundred authorities; the idea of making such a book was original; and the main features of the constitution are set out. Its main defects are an absence of proportion, and, in many places, of an orderly arrangement—both probably due to the fact that, like Jacob's other works, it was too hastily written. Roger Acherley (1665?-1740) was a brother-in-law of Vernon the Chancery reporter. He was a barrister, and a firm supporter of the Hanoverian succession. In fact he was probably the first to advise in 1712 that a writ should be applied for to bring over the Electoral Prince to take his place in the House of Lords as duke of Cambridge. He died in 1740.[2] His

[1] Preface.

[2] D.N.B.; he wrote another work entitled Free Parliaments, below 345 n. 7; to it is added an appendix of letters and papers which passed between the Court of Hanover and a gentleman in London, who was Acherley himself, on the topic of the bringing over of the Electoral Prince; when George I came to the throne Acherley's claims to some reward for his services were passed over, and he died an obscure and a disappointed man.

Britannic Constitution takes the form, as its title-page shows,[1] of a lengthy argument designed to prove the legality and justice of the Revolution settlement in State and Church. In its arguments against those who asserted the divinity of hereditary right, and in its insistence on arguments drawn from the original contract, it echoes the controversies of the seventeenth century. In fact, so long as a Stuart restoration was possible, it was necessary for a book on constitutional law to combat the reasonings of those who supported it. It was therefore necessary for the writer of such a book to defend the Revolution settlement by means of the arguments used by those who had made it.[2] But it is not a merely controversial book. It is also a book on constitutional law; for it sets out carefully the main events of English constitutional history, which were the precedents used by the Whig Party to prove the legality of the Revolution settlement which they had made. No doubt the setting is not that of a modern book on constitutional law, because modern writers have no longer any need to combat doctrines of the divinity of hereditary right, or to rely upon an original contract. But the precedents which they use to prove the fundamental principles of constitutional law on such topics as the position of the King, Parliament, the courts, and the liberties of the subject, are substantially the precedents used by Acherley. Like his successors, he had nothing but praise for these principles. He maintained, as later writers on the same subject in this and the following century have maintained, and as foreign writers admitted,[3] that

> 'tis the *Britannic Constitution* that gives this Kingdom a lustre, above other Nations; for it is *Imperium Legum;* it equally Advances the Greatness and Power of the Crown, at the same time, as it secures to *Britons*, their Private Property, Freedom, and Liberty, by such Walls of Defence, as are not to be found in any other Parts of the Universe.[4]

A new period in the literature of constitutional law opens after 1745. This is due to two causes. In the first place, the

[1] The Britannic Constitution: or the Fundamental Form of Government in Britain. Demonstrating the Original Contract entered into by King and People, according to the Primary Institutions thereof, in this Nation. Wherein is proved that the placing on the throne King William III was the *Natural Fruit* and *Effect* of the *Original* Constitution. And that the Succession to this Crown, Establish'd in the Present Protestant heirs is *De Jure*, and Justify'd, by the Fundamental Laws of Great Britain. And many Important *Original* Powers and Privileges, of Both Houses of Parliament, are Exhibited. He published a supplement in 1741 entitled Reasons for Uniformity in the State, in which he recommended that it should be enacted that ecclesiastics, members of the universities, and all officers of state should be compelled to subscribe their assent to the constitution, and to the righteousness of the succession of William III; this tract was incorporated with the second edition of the book which was published in 1759.

[2] Vol. vi 293.

[3] Vol. x 714-716; below 729.

[4] Dedication to Prince Frederic.

final disappearance of the menace of a Stuart restoration made it clear that the constitution was firmly established on the basis of the Revolution settlement. In the second place, that constitution as thus established had begun to attract the attention of foreign writers; and English writers were beginning to be interested in the study of foreign constitutions. We have seen that Voltaire [1] and Montesquieu [2] had written appreciative descriptions of and comments upon the British constitution; and in 1752 J. T. Philipps published a book on the *Fundamental Laws and Constitutions of seven potent kingdoms and states in Europe, viz., Denmark, Sweden, Germany, Poland, England, Holland and Switzerland.* For these two reasons Blackstone was able to write an account of the British constitution and constitutional law which was both faithful and original. We have seen in the first chapter of this Book that his description gives a faithful account of its main outlines. In fact, if we compare it with the earlier books, it has some claims to be considered the first modern sketch of the law of the constitution. We have seen, too, that it owes something to the works of foreign writers, and more especially to the work of Montesquieu.[3] It was for these reasons that Blackstone's work influenced the work of later writers native and foreign.

The native writer who during this period attempted to sketch some of the main outlines of constitutional law was F. S. Sullivan, Royal Professor of the Common Law in the University of Dublin. His lectures were posthumously published in 1782, under the title of *An Historical Treatise of the Feudal Law and the Constitutional Laws of England.*[4] A later edition was published in 1786, to which an introductory discourse on the laws and government of England was prefixed; and Gilbert Stuart, the editor of this edition, added the authorities for Sullivan's statements. Sullivan explained that the needs of his students had made it necessary for him to adopt a plan which was different from the plan adopted by Blackstone. Blackstone's students were more advanced; and, as Blackstone's lectures were given in the law vacations, they could supplement the information which he gave them by information acquired by means of attendance upon the courts at Westminster. Sullivan, therefore, could not make his lectures so advanced or so comprehensive as Blackstone made his. He adopted the traditional English method, and started with the land law. His first seventeen lectures deal with the feudal law. But, as he pointed

[1] Vol. x 714. [2] Ibid 718-719. [3] Ibid 715-716, 721.

[4] An Historical Treatise of the Feudal Law and the Constitution and Laws of England: with a commentary on Magna Charta, and necessary illustrations of many English Statutes. In a course of Lectures read in the University of Dublin.

out, feudal law has its governmental as well as its proprietary aspects. He therefore went on to give an account of the main institutions of the feudal monarchy—the Crown, the peers and the House of Lords, the commons and the House of Commons, and the villeins. The last part of the lectures consists of an historical outline of legal institutions from the time of the Saxons to Magna Carta; and the last three lectures contain a comment upon the principal clauses of the Charter. The lectures are elementary; and the lecturer lacked the large background of learning, legal and otherwise, which Blackstone possessed. But they are clearly written, and give students a good introduction to the study both of the law of real property and of constitutional law.

The foreign writer who was influenced by Blackstone was De Lolme.[1] De Lolme was born at Geneva in 1740. He was educated as an advocate; but he resolved to leave Geneva to study foreign constitutions. Since the constitution of England particularly interested him he came to England in 1767; and there he wrote his book on the Constitution of England,[2] which has made him famous. It was first published at Amsterdam in French in 1771. It appeared in an English dress and in an enlarged form in 1772, and further additions were made by the author in the editions published in 1781 and 1784. There have been many later editions. In 1772 he published a book in which he compared the old government of Sweden with that of England.[3] Its object was to show that there was no danger that the constitutional government of England could be overturned, as that of Sweden had been overturned by Gustavus III. He wrote later some short tracts on matters of constitutional interest —on some of Pitt's taxes, on the regency question, and on the question whether a dissolution of Parliament put an end to the impeachment of Warren Hastings. He was always poor, and was too proud to ask for favours. In fact his irregular life made it impossible to help him;[4] but it would seem that, before his

[1] Biographie Universelle xxv 42-43; D.N.B.

[2] The Constitution of England; or an Account of the English Government; in which it is compared both with the Republican Form of Government and the other Monarchies in Europe.

[3] A Parallel between the English Constitution and the former Government of Sweden; containing some Observations on the late Revolution in that Kingdom, and an Examination of the causes that secure us against both Aristocracy and absolute Monarchy.

[4] "Sa vie privée est remplie de singularités. . . . Il était presque sans moyens d'existence; et sa fierté l'empêcha toujours de solliciter pour en obtenir. Lorsque enfin des personnages eminents firent des recherches, dont le but était probablement de le secourir, il fut impossible de decouvrir son domicile, parce qu'il en changeait frequemment et qu'il changeait aussi souvent son nom. Il vivait de peu; et son exterieur ainsi que ses habitudes étaient devenus presque repoussants," Biographie Universelle xxv 43.

departure from England, he had been assisted by the literary fund.[1] Having inherited property, he returned to Geneva where he died in 1807.

His book on the English constitution is a book on comparative constitutional law. In the first of its two books he institutes an historical comparison between the government of England and that of France; and from that comparison he deduces the causes of the liberty which England enjoyed. He describes the working of the legislative and executive power, the limitations upon the prerogative, the nature of the liberty enjoyed by Englishmen, and the character of the law, civil and criminal. The second Book is a series of essays on outstanding features of the constitution—such as the unity of the executive power, the division of the legislative power, the representative system, the relations between the Crown and the Legislature, the liberty of the press,[2] the right of resistance, the peculiar position of the English monarchy. Such a book as this naturally attracted much attention both in England and abroad. In England the controversies aroused by the general warrant cases, the Middlesex election, and above all by the American war of independence, had excited much interest in constitutional questions and theories of government. Abroad, the English constitution had long been a topic of interest to political theorists;[3] and that interest was increased after the outbreak of the French Revolution; for some parts of that constitution were taken as a model by those who were making a new constitution for France.[4] Though the book is not always accurate in its statements of fact and in its history, it deserved to succeed because it did call attention to some of the most salient features of the British constitution—the sovereignty of Parliament,[5] the supremacy of the law,[6] the impartial administration of justice,[7] the fairness of the English as compared with the continental criminal procedure,[8] the safeguards to liberty afforded by the

[1] Biographie Universelle xxv 43.

[2] De Lolme tells us in a note to the second part of Bk. ii c. 17 (p. 410, ed. 1810) that he had searched in vain for the positive laws which guaranteed the liberty of the press—" at length it occurred to me that this liberty of the press was grounded upon its not being prohibited," with the addition that " all actions respecting publications are to be decided by a jury "; this statement shows that De Lolme had grasped a salient feature of English constitutional law.

[3] Vol. vi 300; vol. x 714.

[4] Vol. v 493 n. 5.

[5] Dicey says, Law of the Constitution (7th ed.) 41, that De Lolme was the author of the phrase that " Parliament can do everything but make a woman a man, and a man a woman "; I have not found the phrase in De Lolme's book on the English Constitution; but he does say, Bk. ii c. 3, that " the legislative power can change the constitution as God created the light "; and then he goes on to show the advantages of the restraint upon the legislative power arising from its division between King, Lords, and Commons.

[6] Bk. ii c. 17 pt. 2 (at pp. 448-452 ed. 1810).

[7] Bk. ii c. 16 (at pp. 372-374 ed. 1810).

[8] Bk. i cc. 12 and 13.

jury system and the writ of Habeas Corpus,[1] and the subordination of military law to the common law.[2] Like many other of the constitutional thinkers of the eighteenth century,[3] he rightly found the great safeguard to liberty in the separation of the powers in the constitution, and in the checks and balances which the constitution provided.[4]

(2) There is also a little literature upon such particular topics of constitutional law as the prerogative, Parliament, the rights of the subject, the army and navy, and the revenue.

At the beginning of the eighteenth century the schism of the non-jurors caused the continuance of the controversy as to the relation of the King and his prerogative to the law. In 1709 the Rev. Mr. Higden, who was a converted non-juror, tried to demonstrate that the common law rule, that allegiance was due to a king *de facto*, was not opposed to ecclesiastical law.[5] This brought down many replies upon his head from persons who maintained that the King derived his title, not from the law of the land, but from God; and that to maintain that allegiance was due to a king *de facto*—to a king whose only title was his success—was to "dissolve all notion of right and wrong out of the world."[6] Such controversies as these died down as the eighteenth century grew older, and as the fact that the King's title depended upon the Act of Settlement, and the fact that the prerogative was subject to law, were universally recognized. But, as yet no modern law book appeared on the prerogative as a whole and on its various parts. For detailed information on these matters it was necessary to have recourse to the Abridgments.

It was also necessary to have recourse to the older authorities and to the Abridgments for information about Parliament. There is still a little controversial literature on the position of Parliament;[7] but there is no book which sets out to describe fully its constitution, powers, privileges and procedure. Perhaps the most important book on a particular topic connected

[1] Bk. i cc. 13 and 14. [2] Bk. ii c. 17 pt. 2 (at pp. 457-462 ed. 1810).
[3] Vol. x 714-716. [4] Ibid 721.
[5] A view of the English Constitution with respect to the Sovereign Authority of the Prince and the Allegiance of the Subject. A Vindication of the Lawfulness of taking the Oaths to Her Majesty by Law required.
[6] The Constitution Laws and Government of England vindicated in a Letter to the Reverend Mr. William Higden; another similar tract is the English Constitution fully stated with some Animadversions on Mr. Higden's mistakes about it in a Letter to a Friend; Higden replied in A Defence of the View of the English Constitution by way of reply.
[7] In 1731 Roger Acherley wrote a book entitled Free Parliaments: or an Argument on their Constitution; Proving some of their Powers to be independent. It is mainly a Parliamentary history of the last years of Anne's reign from an Hanoverian point of view; in the Appendix is Acherley's correspondence with the Hanoverian court as to the bringing over of the Electoral Prince, above 340 n. 2.

with Parliament is Hatsell's book on the procedure of the House of Commons, of which I have already given some account.[1] But there was one topic which, because it was of considerable interest to practising lawyers, did produce some literature. That was the topic of elections. In 1755 Thomas Carew published in a large folio volume *An Historical Account of the Rights of Elections of the several Counties, Cities, and Boroughs of Great Britain.* After a learned preface, in which the origins of Parliament and the rights of election are discussed, an account is given in alphabetical order of the franchise in all the boroughs in England, as settled by the resolutions of the House of Commons on election petitions. The same plan was pursued by T. Cunningham in his *Historical Account of the Rights of Election* which was published in 1783. He brought Carew's preface up to date, and inserted precedents from the Long Parliament which Carew had omitted. We have seen that Douglas, the reporter in the court of King's Bench, had also made reports of election cases, which he published in 1775-1777, and that other reports of election cases began to appear about the same time.[2] The publication of these reports gave an opportunity for a more logical treatment of the subject, which was provided by Simeon's short book on *The Law of Elections*, which was published in 1789.

Not very much was written on the rights of the subject. Lord Somers' tract on grand juries, which was first printed in 1682, was reprinted in 1716 and 1718;[3] and in 1701 he published another tract which supported the right of the subject to petition Parliament.[4] In 1758 the bill to extend the provisions of the Habeas Corpus Act of 1679 to persons who were not imprisoned on a criminal charge,[5] produced a tract which advocated this change.[6] Two short books, published in 1784[7] and 1785[8] on the rights of British subjects, dealt ably with the

[1] Collection of Rules and Standing Orders of the House of Commons relative to the Applying for and Passing Bills, vol. x 536.

[2] Above 109.

[3] The Security of Englishmen's Lives, or the Trust Power and Duty of the Grand Juries of England; it was also reprinted in 1757 and 1771 in a Guide to the Knowledge of the Rights and Privileges of Englishmen.

[4] Jura Populi Anglicani; or, the Subject's Rights of Petitioning set forth. Occasioned by the case of the Kentish Petitioners, with thoughts on the reasons which induc'd those gentlemen to petition, and of the Commons Rights of Imprisoning.

[5] Vol. ix 119-121; vol. x 608; above 238, 249, 252.

[6] Inquiry into the nature and effect of the Writ of Habeas Corpus, the great bulwark of British Liberty, both at Common Law and under the Act of Parliament; and also into the propriety of explaining and extending that Act.

[7] An Investigation of the Nature of the Rights of British Subjects, by Redmond Simpson.

[8] A Supplement to the Investigation of the Native Rights of British Subjects, by F. Plowden; the original Investigation had been published in 1784; Plowden was a conveyancer, and the question interested conveyancers because it affected the title to inherit English land.

question of the qualifications for the status of a subject; and, more especially with the question of the effect of a clause in the statute of 1731,[1] as to the nationality of the children of persons attainted of treason, who were born abroad. We have seen that in this century there was some question whether, on a cession of territory, the inhabitants of the ceded territory still remained British subjects. The contentions of Chalmers who asserted that they did not, and of Reeves who asserted that they did, are printed by Forsyth.[2] We have seen that it is the opinion of Chalmers which has prevailed.[3] In 1792 F. Plowden wrote another work entitled *Jura Anglorum*.[4] It is a somewhat rambling statement of some of the principles of constitutional law, which was meant to be a reasoned defence of the constitution against the views advanced by Paine in his *Rights of Man*.

The fact that the army, and the system of military law by which it was governed, though sanctioned only by annual Acts, were permanent institutions, is illustrated by Adye's little book on *Courts Martial*,[5] which was first published in 1769, and reached an eighth edition in 1805. The first part contains a useful summary of the history of martial and military law, and some account of courts martial, courts of inquiry, appeals, the duties of the judge advocate, and the mode of trial. The second part contains an account of the procedure used in these courts, which, it is clear, was modelled, so far as was possible, on the procedure of the common law. With respect to the navy, the controversy as to the justice and expediency of the Crown's power to impress seamen, produced in 1778 a tract by Charles Butler, in which the legality and expediency of this prerogative were asserted.[6]

The growth in the number and complexity of the revenue laws produced a large number of collections of the statutes or abridgments of the statutes relating to different branches of the revenue. There were collections, for instance, of the laws relating to the customs, the excise, the stamp duties, the salt duties, the assessed taxes, and the land taxes.[7] In 1720 the indefatigable Giles Jacob wrote a book on the *Laws of Taxation*;[8]

[1] 4 George II c. 21 § 2.

[2] Leading Cases, 257 seqq., 286 seqq. [3] Vol. ix 87.

[4] Jura Anglorum. The Rights of Englishmen. It is dedicated to Lord Kenyon.

[5] Adye describes himself on the title-page as captain of the royal regiment of artillery, major in the army, and deputy judge advocate to His Majesty's troops serving in North America; to it is appended an essay on military punishments and rewards.

[6] An Essay on the Legality of Impressing Seamen; on this subject see vol. x 381-382.

[7] For a list see L. F. Maxwell, A Bibliography of English Law ii 29-34.

[8] Laws of Taxation; being a treatise of all the Acts of Parliament now in force relating to the taxes of England and other branches of the Royal revenue; to which are prefixed several new schemes for establishing of funds.

and in 1761, T. Cunningham wrote a *History of the Customs* which reached a third edition in 1778.[1] It gives a chronological account of the various sources of this revenue. The first part takes the history down to the end of William III's reign, the second to the end of Anne's reign, the third to the end of George I's reign, and the last to modern times. The various taxing Acts are summarized in chronological order; and, after William III's reign, the taxes are divided under the heads of customs, excise, and inland duties. It is a useful if somewhat pedantic summary. All these revenue Acts gave extensive powers to revenue officials and others, which some persons, including Dr. Johnson,[2] regarded as wholly unconstitutional. In 1748 a tract was published under the name of "Philalethes" which protested against this "new despotism."[3] The same causes as produced these collections of revenue laws produced also special reports of revenue cases. The earliest is a collection of cases published in 1722, which relates to the excise and the jurisdiction of the justices of the peace on informations laid before them.[4] Other collections of cases were made towards the end of the century on the house and window taxes, and on the taxes on servants, horses and carriages, and shops.[5]

Colonial government.—Most of the colonies printed their Acts and Ordinances during the eighteenth century; and copies were available in the libraries of the Inns of Court.[6] One or two books also, in which these Acts were abridged or commented on, were published.[7] But, apart from the controversial literature occasioned by the American war of independence and the events which led up to it, there is not much literature on colonial constitutional law. Three of the most important books which

[1] The History of the Customs, Aids, Subsidies, National Debts, and Taxes of England from William the Conqueror to the present year. The third edition is corrected and improved by suggestions made by Sir Charles Whitworth, the chairman of the Committees of Supply and Ways and Means.

[2] See vol. x 454 n. 8 for his famous definition of the word "Excise."

[3] The title of the tract is, English liberty in some cases worse than French slavery, exemplified by animadversions upon the tyrannical and anti-constitutional power of the Justices of the Peace, Commissioners of Excise, Customs, and Land Tax, etc.; in a letter addressed to the serious consideration of the lesser freeholders and electors of Great Britain.

[4] L. F. Maxwell, A Bibliography of English Law ii 34.

[5] Ibid.

[6] Lincoln's Inn Library has copies of the Acts of the Barbadoes, Bengal, Bermuda, Canada, Granada, Jamaica, Leeward Isles, Maryland, Massachusetts, New York, Quebec; it is clear from the entries of books bought by the Inner Temple in vol. iv of the Inner Temple Records that the Acts of the colonies were regularly bought.

[7] An Abridgment of the Laws in force and use in Her Majesty's Plantations was published in 1704; in 1774 collections of the charters of the East India Company, and of treaties and grants from the country powers were published; in 1778 N. B. Halhed published a code of Gentoo laws; cp. L. F. Maxwell, A Bibliography of English Law ii 199-211.

deal with the law and administration of the colonies are Chalmers' *Opinions*, Pownall's *Administration of the Colonies*, and the chapters in Adam Smith's *Wealth of Nations* which deal with the colonies and India. Chalmers,[1] a Scot who had gone to America and had practised as a lawyer in Baltimore, attached himself to the loyalists when the war of independence broke out. He returned to England in 1775, and became clerk to the committee of the Privy Council for trade and plantations. He used the opportunities which this employment gave him to produce his book of *Opinions*,[2] the value of which, both to historians and lawyers, is obvious from the use which I have made of it in a preceding chapter. Pownall's book is of great interest, because it gives us the views of an able man of liberal views, who had served as governor of Massachusetts and South Carolina, on the relations between Great Britain and her colonies. We have seen that he was one of the few statesmen of the time who realized the importance and the difficulty of the problem of adjusting these relations.[3] The chapters in Adam Smith's book on the relations between this country and the colonies and India are valuable, not only because they contain the critical comments of the leading economist of the day upon the all-important question of the commercial aspect of those relations, but also because they give us many sidelights upon their political and constitutional aspects.

These are perhaps the most important books on colonial government. Three other books show that, throughout the century, the subject was attracting the attention of lawyers. In 1721 Nicholas Trott, Chief Justice of South Carolina, made a collection of the laws of the American colonies and the West Indies relating to the church and clergy, religion, and learning.[4] The collection was made from official editions of the statutes, and it was designed chiefly to help the work of the Society for the Propagation of the Gospel in foreign parts. In 1783 Anthony Stokes wrote an account of the British colonies in North America and the West Indies.[5] Stokes was a Scotchman who had practised

[1] D.N.B.

[2] Opinions of Eminent Lawyers on various points of English Jurisprudence, chiefly concerning the Colonies, Fisheries, and Commerce of Great Britain.

[3] Vol. xi 105-107.

[4] The Laws of the British Plantations and America, Relating to the Church and the Clergy, Religion and Learning. The colonies dealt with and the number of laws in each colony are: S. Carolina (17), N. Carolina (11), Virginia (46), Maryland (31), Pennsylvania (17), New Jersey (4), New York (12), Connecticut (11), Rhode Island (2), Massachusetts (22), New Hampshire (7), Barbadoes (11), Antego (27), Nevis (3), Leward Islands (3), Jamaica (10), Bermuda (3).

[5] A View of the Constitution of the British Colonies in North America and the West Indies, at the time when the Civil War broke out on the Continent of America. In which Notice is taken of such Alterations as have happened since that Time, down to the present Period. With a variety of Colony Precedents, which are chiefly adapted to the British West India Islands.

as a lawyer in Baltimore and had held office in Georgia.[1] He was a loyalist who had been taken prisoner by the Americans, and had been exchanged.[2] His book is a first attempt to give some account of the institutions of the American colonies, and of the nascent topic of colonial constitutional law. It is well and clearly written, and gives a good survey of the constitutions of the British colonies and of the thirteen United States of America. Its main defect is that the author is rather more intent on giving a collection of formal precedents for constitutional acts and legal proceedings in the various colonial courts, especially the courts of Admiralty, than on explaining the law. There is some information about the negro slaves—the author was in favour of the abolition of slavery;[3] and some interesting specimens of conveyances and mortgages of slaves, and of manumissions. He also gives some precedents in conveyancing; and, in an Appendix, the orders in Council as to trade between Great Britain and the United States made pursuant to the Statute of 1783.[4] In 1793 John Reeves, the author of a well-known history of English law,[5] wrote a history of the government of Newfoundland. Reeves had been Chief Justice of the island, and he based his history on the official records of the old Board of Trade, and the Committee of Council for trade and plantations. It is a well-written little book which sets out clearly the very curious constitutional history of the island.[6]

(ii) *Civil Procedure and Pleading.*

In this, as in the preceding period,[7] there is a large literature, and many different types of book, dealing with the various aspects of this topic. I shall first say something of books which deal with procedure in general, and then of books which deal with special topics of procedure. I shall then deal with books which deal wholly or mainly with pleading. We shall see that some of these books deal also with procedure. Lastly, I shall say something of the books of practice which were designed mainly for attornies and solicitors.

Procedure in general.

In 1742 Sir George Cooke, prothonotary in the court of Common Pleas,[8] and the son of a father who had held the same office,

[1] Preface, and p. 137. [2] Preface.
[3] He admits (with some shame) that he had once owned slaves, at p. 415.
[4] 23 George III c. 39. [5] Below 413-414.
[6] Reeves gave the profits of the book (so a note at the beginning tells us) "for the relief of the suffering clergy of France, refugees in the British dominions."
[7] Vol. vi 598-600.
[8] He was made a bencher of the Inner Temple, April 13, 1733, and served as reader in 1742, and as treasurer in 1743-1744, Inner Temple Records iv 270, 446, 464; his father, who had been bencher and treasurer of the same Inn, ibid iv 30-31, 182, died November 13, 1740, ibid iv 407.

published a collection of the rules, orders, and notices in the court of Common Pleas, which reached a second edition in 1747 ; [1] and in the same year he published a similar collection of the rules, orders, and notices in the court of King's Bench,[2] which also reached a second edition in 1747. The arrangement is chronological. Such of the rules as were in Latin were translated, and to the rules notes are appended as to later alterations of practice, and references are given to later rules. The notes to the King's Bench rules are fuller. Amongst the rules of the court of Common Pleas there is an account of the charge of the Chief Justice to a jury of attornies, appointed in 1567 to inquire into the offences relating to the records of the court committed by clerks of the court and others. The importance of ensuring the correctness of the record, the fatal consequences to the litigant of inaccuracies, and the opprobrium which these offences relating to the records cast upon the law, are pointed out in a picturesque passage of that charge. The Chief Justice said :

> Where error is found in this court, it is a great grief to us that sit here to have things not done truely, sincerely, and as they ought to be done, to see our Acts, Determinations and Judgements annihilated and brought to nought, our Court slandered and evill spoken of, our cases and labours made void and frustrate by the onely negligence of Clerks and Ministers, and the poore man and Clyent that hath suffered that harme and losse, he getteth him home with a heavy heart by weeping Crosse, and cryeth *oleum et operam perdidi*. . . . Then he beginneth to think evill of us that are Judges and to suspect our Skill, and then he curseth his Councillor and Attorney, and speaketh evil of the Law, which of itself is most just.

So long lived were the technicalities of the rules of procedure that, right down to the reforms of the nineteenth century, there was much substantial truth in these words of a Chief Justice of the sixteenth century.[3] Similar books on the rules and orders of the court of Exchequer were published in 1766 and 1778 ; [4] and other collections of rules dealt with the equity side of that court.[5]

Besides these collections of rules and orders there were a considerable number of books which set out to give an account of the practice and procedure of the courts. Some of the earliest

[1] Rules, Orders, and Notices in the Court of Common Pleas at Westminster from the thirty-fifth of King Henry VI to Trinity Term the twenty-first of King George II, 1747 inclusive. Carefully examined by the Originals.

[2] Rules, Orders, and Notices in the Court of King's Bench from the second of King James I to Trinity Term the twenty-first of King George II, 1747 inclusiye. Examined by the Originals. . . . Together with Notes Remarks and References showing the antient and present practice of the said Court.

[3] Vol. ix 260-261, 281-282, 315-316.

[4] Rules and Orders of the Exchequer, relative to the Equity Court, the Office of Pleas, and the Revenue ; for an earlier book published in 1688 see vol. vi 599, 686.

[5] Vol. vi 686 ; to a book entitled Ordo Curiae, Rules and Orders in Chancery, which was published in 1699 and 1712, the rules and orders of the Exchequer were added in the third edition, which was published in 1724.

of these books were Chief Baron Gilbert's books [1] on the King's Bench, Common Pleas, and Exchequer, which give an account both of the history of these courts and of their procedure. The first of these books, which was published with his book on Executions in 1763,[2] is a short account of the practice of the court of King's Bench. In the second of these books on the Common Pleas,[3] which was first published in 1737, the information as to the procedure of the court is very full. The editor said truly [4] that Gilbert had explained the reasons for the establishment of "almost every particular branch of the practice"; that he had traced it from its origins, "giving an historical account of the several alterations made therein"; that he had described its present condition, explaining "the fundamental rules by which judges directed their opinions . . . with various distinctions and exceptions"; and that he had also given some account of the practice of the King's Bench and Exchequer, comparing "the practice of those courts with that of the Common Pleas, whereby the practice in general is rendered more perspicuous and clear." The book won high praise from Blackstone, who regarded it as superior to all the other books of practice.[5] The third of these books on the Exchequer,[6] which was published in 1758, is concerned rather with the history and jurisdiction of the court and of the revenues of the Crown, than with its procedure. But two of the chapters deal more especially with procedure.[7]

A very much more comprehensive book, which dealt with the practice and procedure of the courts of King's Bench and Common Pleas, was published by George Crompton in 1780, and reached a third edition in 1786.[8] The author says in his preface that

[1] For Gilbert C.B. and his other books see above 169-170, 182, 186-187; below 355, 366, 369-371.

[2] Below 411; the part dealing with the King's Bench will be found at pp. 307-369 of the book; it also contains some cases touching wills of land.

[3] The History and Practice of Civil Actions, Particularly in the Court of Common Pleas.

[4] Preface.

[5] "These *books of practice*, as they are called, are all pretty much on a level, in point of composition and solid instruction, so that that which bears the latest edition is usually the best. But *Gilbert's history and practice of the court of common pleas* is a book of a very different stamp; and though (like the rest of his posthumous works) it has suffered most grossly by ignorant or careless transcribers, yet it has traced out the reason of many parts of our modern practice from the feodal institutions and the primitive construction of our courts, in a most clear and ingenious manner," Comm. iii 271 n. (*a*).

[6] A Treatise on the Court of Exchequer. An earlier book of Gilbert's entitled An Historical View of the Court of Exchequer, which was published in 1738, is substantially the same book as the later work, but it stops short at Chap. x of that work; it has obviously been taken from an earlier and incomplete MS.

[7] Chap. xii, which deals with process for the recovery of debts on bond and extents in aid; Chap. xiii, which deals with the seizure of forfeited goods.

[8] Practice Common Placed: or the Rules and Cases of Practice in the Courts of King's Bench and Common Pleas, methodically arranged. The copy in Lincoln's Inn Library is interleaved and annotated.

he would like to see a digest of the rules of procedure of all the courts; and he explains that his work is a "commonplace book" in which some of the rules have been noted down. Like Blackstone,[1] he points out that the law on this subject can be better learned from experience and from attendance upon the courts than from books. His book deals in a somewhat disorderly fashion with the origin of the jurisdiction of these two courts, and some of the main rules as to the many complicated steps which might take place in actions in general, and also on or in particular kinds of writs and actions.[2] The book shows us that, though it was more possible to say something about procedure in general than it was in the Middle Ages,[3] it was still necessary to consider the differences between the rules of the procedure of the two courts, and to deal separately with particular actions.

The seventeenth-century compendium of the several branches of practice in the court of Exchequer[4] was reprinted in 1699, 1703, and 1725. In 1731 a book on the practice of the revenue side of the Exchequer was published;[5] and in 1770[6] and 1794[7] books were published on the practice of the plea side of the court. In the latter of these two books the author is careful to state at the outset the advantages of suing in this court.[8]

These books deal with the practice and procedure of the courts of Common Law. The needs of those practising before the courts of the itinerant justices were met by two books, one of which dealt with their criminal, and the other with their civil, jurisdiction. The first of these books is *The Crown Circuit Companion*, which was first published by W. Stubbs and G. Talmash in 1738, and reached a seventh edition in 1799.[9]

[1] Comm. iii 271 n. (*a*).

[2] Thus he deals separately with the following writs and actions: ejectment, replevin, prohibition, quare impedit, partition, waste, dower, error, false judgment, habeas corpus, audita querela.

[3] Vol. ii 520-521.

[4] Vol. vi 599.

[5] Modern Practice of the Court of Exchequer in Prosecutions relating to His Majesty's Revenue of the Customs, [with] an account of the Settlements of the Extended Limits of the Ports in England and Wales and of their lawful keys and wharfs; by a Gentleman of the Exchequer Office.

[6] Nature and Extent of the business in the Office of Pleas in Lincoln's Inn, by P. Burton.

[7] The Solicitors Guide to the Practice of the Office of Pleas in His Majesty's Court of Exchequer at Westminster, in which are introduced Bills of Costs in various cases and a Variety of useful precedents, by Richard Edmunds, attorney of the said office.

[8] He points out that all attornies are solicitors in that court; it would seem also that the court, like the court of Chancery, had its own attorney and clerks, through whom, in theory, the business was done, vol. vi 435 n. 3, 455 n. 3; he points out, at pp. 4-5, that it was to the pecuniary advantage of country solicitors to employ the clerks of the court rather than a London agent.

[9] The Crown Circuit Companion, Containing the Practice of the Assizes on the Crown Side; with the Courts of the General and General Quarter Sessions of the Peace.

It explains what "the Assizes" are, and gives an account of procedure employed at them. It gives also precedents of indictments and other forms, and explains the law on which these indictments and forms are based. It explains in a similar manner the procedure at quarter and general sessions. It must have been a useful book to circuiteers. It contains many useful precedents, and much miscellaneous information compendiously stated. The second of these books is *An Introduction to the Law Relative to Trials at Nisi Prius.* It was first published anonymously in 1767. Its author was Henry Bathurst, afterwards Lord Chancellor;[1] and it was founded on a similar work which he had published in 1760. Later editions were edited by his nephew Buller, who, as we shall see,[2] became a distinguished judge; and the book came to be known as *Buller's Nisi Prius.* The book in this form reached a seventh edition in 1817.[3] It is a good deal more than a book of practice. The first part deals with actions founded on tort, the second with actions founded on contracts, the third with actions given by statutes, the fourth with criminal prosecutions relative to civil rights, the fifth with traverses and prohibitions, the sixth with evidence in general,[4] and the seventh with general information relative to trials, such as juries, demurrers to evidence, bills of exceptions, and costs. The book contains a good deal of substantive law, but it is stated from the procedural point of view. It is essentially a practitioner's book. The preface to the 1817 edition described it truly, when it said that it was a collection of rules and principles, by which cases before a judge and jury were governed, and a circuit companion.

Special topics of procedure.

The earliest of the books on special topics of procedure was an anonymous book on *The Law of Errors and Writs of Error*, which was published in 1703. The author in his preface emphasizes with some justice the importance of the determinations of the courts on writs of error:

> It is to writs of error that we chiefly owe our settled law cases, which have been resolved upon mature deliberation and with great solemnity, insomuch that our "Chequer-Chamber cases," like the Laws of the Medes and Persians, very seldom receive any alteration or contradiction.

The book is dry and technical. It explains the different varieties of writs of error, and the pleadings on these writs. It gives some information on writs of error to reverse outlawries, and

[1] Above 313-314. [2] Below 488-492.

[3] A book entitled An Institute of the Law Relative to Trials at Nisi Prius, by Arthur Onslow (1789) is only another edition of Buller.

[4] Below 366, 367.

fines and recoveries ; on writs of error from inferior courts, and from Wales and Ireland ; and on writs of error in Parliament.

Chief Baron Gilbert wrote three books on special topics of procedure. The first of these books is *The Law and Practice of Ejectments*, which was first published in 1734. It deals clearly with the subject in six short chapters, which describe the history of the action, process, the declaration, pleas and the general issue, the verdict, and judgment and execution. There is also some account of the writ *quare ejecit infra terminum.* At the end of the book is a large collection of forms and precedents.[1] The second of these books is *The Law and Practice of Distress and Replevin* which was published in 1757, and reached a fourth edition in 1823. Like Gilbert's other books, it is short, clear, and comprehensive. It explains what the law originally was and how it has been altered by statute. The third of these books is *The Law of Executions* which was published in 1763. It gives a clear account of the different writs by which execution could be got at common law—*fieri facias*, *levari facias*, *elegit*, *capias*. It gives some information on the topic of outlawry, and proceedings against those who had given bail. Lastly it gives some information as to execution on particular writs, such as *audita querela*, *certiorari*, and *dower*. As with procedure in general, so with execution, it was necessary to say something of the peculiarities of particular actions. A later book by Thomas Legge, published in 1779, on *The Law and Practice of Outlawry in Civil Actions*, covers part of the same ground. The book was inspired by a case on the subject in which the author had been concerned. He explains the law and practice, indicates some of the abuses of the law,[2] and makes some suggestions for its reform.[3]

In 1737 John Mallory published a book on the writ of *quare impedit.*[4] The first part contains an abridgment of the law. It deals with rights of patronage, and then describes the pleadings and process on the writ. The second part consists mainly of precedents of pleadings and judgments. The preface contains an argument controverting some of the theories as to the ecclesiastical jurisdiction and as to other matters which had been put forward by Bishop Gibson in his *Codex Juris Ecclesiastici Anglicani.*[5]

[1] The book consists of 124 pages, and there are 235 pages of precedents.

[2] One abuse is that it is possible easily to get a defendant outlawed, and to compel him to pay the costs of its reversal ; another, that, if a defendant allows himself to be outlawed, and then gets released on bail, the plaintiff cannot recover the costs of the outlawry till he gets judgment in the original action.

[3] At pp. 91-93.

[4] Quare Impedit. In Two Parts. Part I containing an Abridgment of the Law. . . . Part II containing Precedents of Pleadings.

[5] Below 608-610.

The last of these books on special topics of procedure is serjeant Sayer's *Law of Costs* which was first published in 1768. It is a comprehensive little book in forty-nine short chapters. It deals first with the plaintiff's and then with the defendant's right to costs. Then it goes on to deal with the right to costs in different forms of actions, and in various events, e.g. if the plaintiff sues in *forma pauperis*, if there is a repleader, or if there is a new trial. Something is said as to costs in criminal proceedings, as to taxation, and as to the cases when an attorney can be made to pay the costs which he has incurred. It is clear from this book that the enactments of the Legislature, the rules laid down by the courts, and the complexity of their procedure, were giving rise to a considerable body of law on this subject.

Pleading.[1]

The number of books on pleading is very large, and they vary greatly in size and contents. Some are wholly or mainly collections of precedents. Others, in addition to giving collections of precedents, give information as to the rules both of procedure and pleading. Others contain notes on some of the precedents which are intended to guide the practitioner in his choice of a pleading. From the large mass of these books it is only possible to select one or two representative specimens.

In 1703 Sir Charles Ingleby published a collection of forms of declarations, pleadings, verdicts, judgments, and judicial writs, which had been compiled by the late Henry Clift.[2] The precedents are arranged under alphabetical headings, with an appendix of the precedents which could not be placed under these headings. *The English Pleader*, published in 1734 by a gentleman of Lincoln's Inn, gave a large collection of pleadings and precedents, useful, it is said in the Preface, to attorneys and their clerks.[3] It is clear from this and other books that the Act of 1731, which substituted English for Latin as the language of the records,[4] had created a demand for authoritative English

[1] For the older books on this topic see vol. v 385-386; vol. vi 600.

[2] A New Book of Declarations, Pleadings, Verdicts, Judgments, and Judicial Writs with the Entries thereupon. . . . Compiled by Mr. Henry Clift, late of Furnival's Inn. . . . Now Digested and Published for the Common Benefit of the Professors of the Law by Sir Charles Ingleby, Knight, Serjeant at Law.

[3] The English Pleader. Being a Select Collection of Various Precedents on Actions brought in the Courts of King's Bench and Common Pleas at Westminster in Case, Debt, Covenant, Trespass, Trespass and Assault, Ejectment, Replevin, Prohibition, etc. Taken from the Rolls in the Treasury of the said Courts and Forms settled by Counsel and Special Pleaders, since the Commencement of the Act of Parliament for the Laws being in the English Language. To which are added the Forms of Pleas both General and Special with Replications thereto. As also Judgements in both Courts on the Several Actions. And likewise Fines and Precedents of Recoveries and Concords of Fines.

[4] 4 George II c. 26; vol. ii 479; above 213-214.

versions of the Latin forms. In 1786 *The Pleader's Assistant*[1] gave a collection of pleadings taken from precedents drawn by many of the eminent pleaders of the day.[2] The book begins with precedents of the common counts, and then goes on to give precedents for actions on the case, actions of covenant and debt, demurrers, proceedings in error, indictments, informations, various pleas, *qui tam* actions, actions of replevin, trespass, trover and various writs. The precedents are short and clear; but the book is not very well balanced.

Of the books which give information both as to pleading and as to procedure, the most elaborate is the *Instructor Clericalis*,[3] which is a new and very much more elaborate edition of a work bearing the same name, which was published in 1693.[4] In this edition it is a work in six volumes. But it would seem that the last two volumes, which give precedents of pleading in debt, detinue, quare impedit, replevin, trespass, trover, and waste, were the first to be published. They were published in 1722, volumes two and three were published in 1724, and volumes one and four in 1727. The first volume gives elementary information as to practice—the abbreviations and contractions of words, filling up and suing out writs, drawing up simple pleadings, making up issues, ingrossing records, entering judgments, suing out writs of execution, passing fines. The second volume goes on to give "lessons of a higher form." After some information as to actions and declarations in general, it deals with the "nature and kind of the several actions on the case."[5] It gives a large number of precedents, references to other collections of precedents, and notes as to the law on which the pleading forms were founded.[6] The third volume is mainly composed of precedents of pleading with some notes as to the rules of pleading. The fourth volume contains mainly pleas in bar to various actions,[7] and a note on the law as to pleas in bar to seven

[1] Pleader's Assistant; containing a Select Collection of Precedents of Modern Pleadings in the courts of King's Bench Common Pleas, etc. . . . with Forms of Writs in Several Places: Interspersed with Cursory Observations and Instructions.

[2] The pleaders named are serjeants Agar, Bootle, Belfield, Sir W. Chapple, serjeant Draper, Sir J. Darnell, serjeants Eyre, Hawkins, Hussey, Mr. Hardcastle, Mr. L. Robinson, Sir M. Wright, the late Mr. Warren.

[3] Instructor Clericalis. Directing Clerks in the Present Practice of the Courts of King's Bench and Common Pleas, by R. G. a Clerk of the Common Pleas.

[4] Vol. vi 602.

[5] "After the first process we went on to issue trial and judgment, before we came to our declarations, yet *causa patet*, the former was our young clerk's principal and common business, and therefore to him most necessary. But now we will look into lessons of a higher form, and after premising some rules and observations touching actions and declarations in general, we will go on more regularly to show the nature and kinds of the several actions on the case," vol. ii 1-2.

[6] E.g. there are notes on the action of covenant at pp. 355-359, and on the action of debt at pp. 309-316.

[7] Debt, Detinue, quare impedit, replevin, trespass, waste.

different kinds of covenant. The last two volumes are, as we have seen, composed of the precedents of pleading in different kinds of action. It is a miscellaneous book, not very well arranged. But it contains a mass of useful information on practice and pleading, and more especially on pleading. A somewhat similar book was published in two volumes—the first volume in 1734 and the second in 1735—entitled *Modern Entries in English*.[1] It aimed at three things: to give a collection of precedents of pleading, to give information as to the law of procedure and pleading, and to give an abridgment of pleading and practice cases. The information upon these three topics is given under alphabetical headings.

A considerable number of these collections of precedents contain short notes on some of the precedents. In 1723 John Lilly, late principal of Clifford's Inn, published *A Collection of Modern Entries*[2] which reached a third edition in 1758. The first part of the book contains pleadings grouped under alphabetical headings from "Abatement" to "Trespass," together with precedents relating to outlawries and their reversal, and to wager of law. The second part deals with entries on the rolls of the court, and contains precedents of the entries of the formal stages of an action, and other matters cognate thereto. The third part contains precedents of writs original and judicial. The precedents are accompanied by marginal notes which contain references to practice books and cases. W. Bohun published another collection of a similar kind in 1733.[3] Besides precedents of pleadings in the courts of King's Bench and Common Pleas, it contained precedents for proceedings in the Petty Bag Office in Chancery and in the courts of corporations. The precedents are taken from older books of entries and from the rolls of the courts. Marginal notes explain the nature of the actions and the pleadings. In some cases the whole record, from declaration to judgment, is given. The pleadings are grouped round the various actions. By far the most elaborate book of this

[1] Modern Entries in English: Being a Select Collection of Pleadings in its Courts of King's Bench, Common Pleas, and Exchequer. . . . Translated from the most Authentic Books, but chiefly from Lutwich's, Saunders's, Ventris's, Salkeld's, and the Modern Reports. . . . Together with Readings and Observations on the several Cases in the Reports, as well as relating to the Precedents herein, as to all other Cases incident to each particular Title.

[2] A Collection of Modern Entries, or Select Pleadings in the Courts of King's Bench, Common Pleas, and Exchequer. . . . Many of them drawn or perused by Mr. Broderick, Carthew, Comyns, Darnal, Holt, Levinz, Lutwyche, Northey, Parker, Pemberton, Pengelly, Thomson, Trevor, Ventris, Wearg, and other learned counsel. As also special Assignments of Errors, and Writs and Proceedings thereupon, both in the said Courts and in Parliament. With the method of sueing to and reversing Outlawries by Writ of Error or otherwise.

[3] Declarations and Pleadings in the most usual actions brought in the several courts of King's Bench and Common Pleas at Westminster.

kind is a great collection in ten volumes made by John Wentworth between the years 1797 and 1799.[1] Volumes four and six contain precedents of pleading in criminal cases. The other volumes contain precedents in civil cases. The precedents are grouped under general titles, and to each title there are appended an elaborate analysis and an index. To some of the pleadings the names of the counsel who drafted them are appended, together with their advice upon them. In some cases counsel's opinion on the case is given. Thus in volume ten there is an opinion by serjeant Hill on a writ of right,[2] and in another case there is an opinion on a projected action of ejectment.[3] The analyses sometimes give well thought out schemes for the grouping of substantive branches of the law. In volume nine, for instance, there is a well thought out analysis of the contents of the law of tort. The author tells us that he had contemplated writing a book on pleading.[4] If he had done so it would have been a very valuable work; for this collection shows that he was a man of great industry and ability. There was need for such a book; for, if we except the article on pleading in Comyns' Digest, no systematic book had appeared on pleading during this century which can be compared with the *Doctrina Placitandi* of the last century,[5] and Stephen's classic work at the beginning of the following century.[6]

The attorneys' and solicitors' practice books.

Two books, intended to give the attorney the kind of practical information which he would be likely to need in the course of his daily work, were published in 1733. The first is entitled *The Attorney's Pocket Companion.*[7] The preface would lead us to think that it was by the same author as *Modern Entries in English.* The author emphasizes the importance of his translation of the Latin forms which had been rendered necessary by the statute of 1731.[8] He does not altogether approve of that

[1] A Complete System of Pleading: Comprehending the most Approved Precedents and Forms of Practice; chiefly consisting of such as have never before been printed: With an Index to the Principal Work, incorporating and making it a continuation to Townshend's and Cornwall's Tables, to the present time; as well as an Index of Reference to all the Ancient and Modern Entries extant. For Townshend's and Cornwall's Tables see vol. v 386.

[2] Vol. x 204-211. [3] Ibid 47-48. [4] Ibid Preface.

[5] Vol. v 386-387. [6] Vol. ix 312, 323.

[7] The Attorney's Pocket Companion; Or, a Guide to the Practisers of the Law in two Parts. Being a Translation of Law Proceedings in the Courts of King's Bench and Common Pleas, containing a Collection of known Forms beginning with the Original, and ending with the Judicial Process. Together with an Historical as well as Practical Treatise on Ejectments. To which is added the Law and Practice of Fines and Recoveries and several other Precedents, with some Remarks on the Forms of the Habeas Corpora and Jurata now in use.

[8] 4 George II c. 26.

statute, and he criticizes certain features in it which were subsequently amended.[1] The book gives a large amount of information, which is, for the most part, grouped round the various steps which may be taken in actions in the courts of King's Bench and Common Pleas. All this information is given from the point of view of the practical part of an attorney's work, with just enough information as to the background of legal principles to make it intelligible. The second of these books is *The Clerk's English Tutor*[2] by an Attorney-at-Law. It gives much the same information as the first of these books, but rather differently arranged. It begins with procedure, goes on to pleading, and says something about the drafting of briefs, entering judgment, execution, forms of writ, and bail. It ends with giving some account of privilege of Parliament and writs of error in Parliament. A better and a more orderly account of these matters was given by R. Richardson in his books on *The Attorney's Practice in the Court of Common Pleas* and the *Attorney's Practice in the Court of King's Bench*, which were first published in 1739. Both books deal with practice and pleading; and in the preface to the former the author points out that an attorney ought to have some skill in special pleading, because it teaches him the reason for many of the rules of practice. But it is clear that the growth in the complexity of this branch of learning was causing it to pass into the hands of a specialized branch of the legal profession,[3] for he tells us that, in his day, it was much neglected by attorneys. In 1725 an anonymous writer published a little book on a special branch of the attorney's, and more especially the solicitor's practice—the drawing and taking of affidavits.[4]

In view of the series of statutes which was passed to regulate attorneys and solicitors, and the rules which the courts were laying down as to their rights and duties,[5] it is not surprising to find that in 1764 a book was published on *The Law of Attornies and Solicitors*. It deals with such matters as the definition of

[1] 6 George II c. 14 §§ 3 and 5.

[2] The Clerk's English Tutor. Showing the Practice of the Courts of King's Bench and Common Pleas, as they are now settled pursuant to the several late Acts of Parliament, and the respective Rules of both the Courts made consonant thereto. With great variety of curious English Precedents of Declarations and Pleadings . . . drawn by the most Eminent Counsel of the Present Age. And done into English comformable to the Statute of 4 Geo. 2 c. 26.

[3] Vol. vi 446; above 27.

[4] The Attorney and Solicitor's Companion: or, Compleat Affidavit Man. Containing the Laws, Statutes, Rules, and Orders of our Courts, relating to Affidavits; and also instructions for drawing, and great variety of Forms of Affidavits, in all Courts and all Causes. To which are added some Curious Depositions and Interrogatories in the most extraordinary Cases, with directions how to be taken by Commissioners to examine Witnesses.

[5] Above 52-62.

an attorney, who can appear by attorney, the attorney's qualifications, his retainer, his power and authority, the determination of his authority, his costs and their recovery, offences he may commit, and his privileges. It is a good summary of the relevant statutes, rules, and cases.

(iii) *Criminal Law and Procedure.*

The large literature which centred round the justices of the peace [1] necessarily gave much information on this topic, partly because the criminal jurisdiction of quarter and petty sessions was extensive, and partly because, at the beginning of the eighteenth century, much of the work of local government was carried on under the forms of the criminal law—under the forms of presentment, indictment, and conviction.[2] But apart from this literature, which aims not so much at explaining legal principle as of giving practical information to the justices, there are a certain number of books which were written more especially for lawyers, and aim at expounding the principles underlying this branch of the law. In fact, from the sixteenth to the nineteenth centuries the literature of criminal law has maintained a high standard. Staunford [3] in the sixteenth century, Coke [4] and Poulton [5] and Hale [6] in the seventeenth century, Hawkins and Foster [7] in the eighteenth century, Stephen in the nineteenth century, are a succession of authors whom it would be difficult to match in any other branch of legal literature. Of Foster I have already spoken. At this point I must say something first of Hawkins's work and of one or two other less important books on the substantive law; secondly of books on procedure; and thirdly of a book on the principles of punishment, and the principles which ought to guide the administration of the criminal law.

(1) William Hawkins (1673-1746) [8] was a member of the Inner Temple. He became a serjeant-at-law in 1723. His first book was an abridgment of Coke upon Littleton which ran through many editions.[9] His great book—*A Treatise of the Pleas of the Crown* [10]—was first published in 1716, and later editions were published in 1724, 1739, 1762, and 1771. It is in two books, the first of which deals with substantive law, and the second with procedure. The aim of the treatise, the author tells us, was

[1] Above 332-335. [2] Vol. x 146-151. [3] Vol. v 392.
[4] Ibid 469-470. [5] Ibid 392-393. [6] Vol. vi 589-590.
[7] Above 135-137. [8] D.N.B.

[9] He also published an Abridgment of his Treatise on criminal law in 1728 and a collection of statutes in 1735; D.N.B.

[10] A Treatise of the Pleas of the Crown: or, A system of the Principal Matters relating to that Subject, digested under their Proper Heads.

to vindicate the justice and reasonableness of the law in criminal matters, and to reduce them into as clear a method, and explain them in as familiar a manner, as the nature of the thing will bear.[1]

The existing treatises were not complete,[2] and the books written to instruct the justices of the peace were also incomplete, since they only treated of those parts of Crown law which concerned them. Hawkins succeeded in attaining his object. The first book gives a complete survey of the substantive law in eighty-six chapters: the second book gives in fifty-one chapters a complete survey of the courts exercising criminal jurisdiction; of arrest, bail, commitment, prison breach, escape, rescous, and attachment; and of criminal procedure. Both books of the treatise are clearly written and arranged, and are based upon all the relevant authorities mediæval and modern. The treatise is remarkable both for the learning of the author and his skill in the presentment of his material.

The only other books on the substantive law which need be noticed are some short tracts on the subject of treason. Two of these tracts were published in 1710. The first was a collection of statutes in force relating to treason, which was undertaken in pursuance of an order of the House of Lords, that such a collection should be made and subscribed by the judges, and published for the information of the people.[3] The second was a detailed account of the procedure on trials for treason.[4] It was published in consequence of the Act of 1708,[5] which introduced the English law of treason and the English procedure on trials for treason into Scotland, in order to assist the Scotch judges to administer the law in accordance with the Act.[6] A third tract was published in 1746 in view of the forthcoming trials of those who had taken part in the rebellion of 1745.[7] It is a clear and accurate summary of the substantive and adjective law. The last of these tracts is Charles Yorke's defence of the rule that a conviction for treason entailed forfeiture and corruption of blood.[8] It is a learned and

[1] Preface.

[2] It should be noted that Hale's great History of the Pleas of the Crown (vol. vi 589-590) was not published till 1736, and only the first book, which dealt with treason and felony, had been written.

[3] A Collection of the several Statutes and Parts of Statutes now in Force relating to High Treason and Misprison of Treason. The Statutes begin with 25 Edward III St. 5 c. 2 and extend to 7 Anne c. 25.

[4] A Form and Method of Trial of Commoners in Cases of High Treason and Misprison of High Treason, pursuant to William III's Statute, and also in other cases of treason when that statute is not applicable.

[5] 7 Anne c. 21.

[6] This is stated in the tract of 1746 p. 41, see next note.

[7] A Short Discourse of High Treason, more Especially on Three Clauses of the Statute of Treasons, viz. 1. Compassing the King's Death. 2. Levying War against the King. 3. Adhering to his Enemies.

[8] Some considerations on the Law of Forfeiture for High Treason, occasioned by a Clause in a late Act for making it Treason to correspond with the Pretender's sons or any of their Agents, etc.

a well-reasoned pamphlet which states the existing rules of English law accurately, shows that they are the logical consequence of the feudal system, and proves that similar laws were known in English law, Roman law, and in modern European states. Like Bacon,[1] Yorke argues that the rule can be substantially justified on grounds of public policy :

> Society, by making the loss of those rights it confers upon every man, a penalty for the greatest crime, which can be committed against his country, interests every relation and dependent in keeping him firm to the general tranquility and welfare.

The rule is in fact a most effective deterrent to a man who is contemplating treason ; for " the distress of his family will abate the ardour of his resolution." [2]

(2) In 1723 a considerable collection of precedents relating to Crown law, which had been collected by serjeant Tremaine, was published by John Rice.[3] Sir John Tremaine belongs to the seventeenth century. He was made serjeant and King's serjeant and knighted in 1689, and died in 1694.[4] Rice digested and revised Tremaine's precedents ; and he added a table, which gives the date of the case from which the precedent had been taken, its substance, and, where the case had been reported, the reference to the report. A book which dealt with a particular branch of criminal procedure was published by William Boscawen [5] in 1792. It is entitled *A Treatise on Convictions on Penal Statutes*, and was intended to help the justices of the peace in that part of their duty which consisted in the enforcement of penal statutes, by stating the rules for their guidance which had been laid down by the judges.[6] The first part of the book states these rules, and the second gives a collection of precedents arranged under alphabetical heads. Boscawen had been a pupil of Buller, J. He dedicated his book to him, and most of the precedents in it were collected whilst he was in his chambers.[7]

[1] For Bacon's views see his argument in Chudleigh's Case, cited vol. vii 200.

[2] At p. 19. A Discourse concerning Treason, and Bills of Attainder (1716) by Richard West, who was made a King's Counsel and bencher of the Inner Temple in 1719 (Calendar of Inner Temple Records iv 50), is a party pamphlet, containing much fallacious argument and much dubious law and history, written to prove that the members of Queen Anne's last ministry, against whom the secret committee of the House of Commons had reported, could be proceeded against by Parliament by way of an Act of Attainder.

[3] Placita Coronae : or Pleas of the Crown, in Matters Criminal and Civil. Containing a large Collection of Modern Precedents, viz. Appeals, Convictions, Certioraris and Pleadings thereto, Indictments, Informations, Traverses, Pleadings, etc., Writs of Mandamus Quo Warranto Restitution Habeas Corpus etc., and returns thereof. With Great Variety of Precedents under many other Heads, relating to Crown Law.

[4] D.N.B.

[5] Boscawen (1752-1811) was educated at Eton and Exeter College, Oxford ; he was a translator of Horace, and published books both literary and legal, D.N.B.

[6] Introduction.

[7] Ibid.

(3) We have seen that both the frequency with which the law punished crimes with death, and the mitigation of this severity by means of the royal power to pardon or to commute the death penalty, had given rise to much criticism and controversy.[1] In fact, not only this characteristic of the criminal law, but very many of its other characteristics were open to criticism; for it was coeval with the common law, and retained traces of all the stages of civilization through which the common law had passed. To it statutory additions had constantly been made, and some few parts of it had been reformed; but it had never been overhauled in the light of modern ideas as to the aims and methods of punishment, and as to the degree of criminality which ought to attach to various offences. The first person to review English criminal law at once critically and comprehensively was William Eden (1744-1814), afterwards first Lord Auckland, the friend of Pitt, and one of the ablest of his supporters. His abilities as a statesman, diplomatist, and economist, were shown by his negotiation of the commercial treaty with France in 1787, and by the manner in which he helped Pitt to carry the Union with Ireland.[2] He was educated at Eton and Christ Church and was called to the bar by the Middle Temple in 1769. That he would certainly have made his name as a lawyer, if he had not deserted law for politics, is shown by his book on the *Principles of Penal Law* which was first published in 1771, and reached a second edition in the same year. The first nine chapters deal with the principles upon which punishment ought to be inflicted. Eden starts with the principles, first, that the prevention of crime is the end of punishment, and, secondly, that the penalty should be aggravated in proportion, not to the temptation, but to the malignity of the crime. From this point of view he discusses various punishments inflicted by English law and the laws of other states. The remaining twenty-seven chapters of the book contain a discussion of different varieties of crime—crimes, relative to religion, crimes relative to the law of nations, treason, other crimes relative to the state, murder, other crimes against the person, crimes relative to property; and a discussion of English trials for treason, the development of criminal procedure, the composition and promulgation of laws, and the execution of penal laws. When Eden became a member of the House of Commons he did not lose his interest in this subject. He tried without success to induce the Legislature to adopt his view that it would be politic to substitute the penalty of hard labour for that of transportation.

Eden's book is a pioneer treatise. It discussed topics which, under the influence of Bentham and Romilly, aroused much

[1] Vol. xi 562-565. [2] D.N.B.

attention in the last years of the eighteenth and the first years of the nineteenth century; and it discussed them effectively, because, as the author says in his closing chapter, he had tried to establish his principles, not as abstract propositions, "but rather as argumentative inferences, interwoven with, and to be collected from, observations on the penal systems of different governments."[1] Thus, after describing the punishment for high treason, he condemns it:

> Whatever exceeds simple death is mere cruelty. . . . There is no such thing as vindictive justice; the idea is shocking. Public utility is the measure of human punishment; and that utility is proportionate to the efficacy of the example. But whenever the horror of the crime is lost in sympathy with the superfluous sufferings of the criminal, the example loses its efficacy, and the law its reverence.[2]

Dealing with the complicated mass of statutes which had made larceny from a house, not amounting to burglary, capital, he says:

> It is a melancholy truth . . . that, exclusive of those who are obliged by their profession to be conversant in the niceties of the law, there are not ten subjects in England, who have any clear perception of the several sanguinary restrictions, to which on this point they are made liable.[3]

The conclusion which he draws, that the reform of the English penal code "is become an important and almost necessary work,"[4] is irresistible. That reform was, as he said, necessary in order that "the innocent might be protected from unnecessary severities, and that the guilty be conducted with certainty to punishments proportionate to their crimes."[5] The book is a remarkable precursor of that new era of agitation for the reform of the law, which, under Bentham's leadership, was soon to begin.

(iv) *Evidence.*

We have seen that, at the beginning of the eighteenth century, the foundations of the law of evidence had been laid.[6] Though at the beginning of the eighteenth century it was then, as it is now, closely connected with the law of procedure civil and criminal, it was beginning to emerge as so separate a branch of the law that, as early as 1717, W. Nelson published a digest of cases upon it, which reached a third edition in 1739.[7] The

[1] At p. 328 (2nd ed.). [2] At p. 151. [3] At p. 289.
[4] At p. 328. [5] At p. 331. [6] Vol. ix 127-222.
[7] Law of Evidence; wherein all the cases that have yet been printed in any of our Law books or tryals, and that in any wise relate to points of Evidence are collected, and methodically digested under their proper Heads.

cases are digested in twelve chapters;[1] and each chapter consists of numbered propositions founded on cases, statutes, and other authorities, which are not arranged on any intelligible plan. The law is for the most part grouped round the forms of action, and there is no attempt to extract its underlying principles.

But in some of the other books published on this subject during this century, this attempt is made.[2] It is made in the articles upon the law of evidence contained in the Abridgments of Comyns, Viner, and Bacon, but more especially in Gilbert's *Law of Evidence*, and Bathurst's[3] treatment of the topic in his *Introduction to the Law relative to Trials at Nisi Prius*, which was later incorporated with his nephew Buller's *Nisi Prius*.[4] Of these two books Gilbert's is the more important. That it retained its importance throughout the century can be seen from the fact that (like Gilbert's other books)[5] it was first published posthumously in 1754, and that it reached a sixth edition in 1801.

Gilbert begins his book with a discussion of the degrees of probability. In a trial as to the existence of a right all matters must be ranged in the scale of probability, "so as to lay most weight where the cause ought to preponderate, and thereby to make the most exact discernment that can be in relation to the right."[6] Acts arising out of the business of civil life and the rights to which they give rise are not capable of absolute demonstration, so that they must be determined by probability. Probability is not, like demonstration, "founded on the view of a man's own proper senses," but it is founded on "indistinct views or upon report from the sight of others."[7] The fact that such reports must be accepted and allowed as a demonstration "is the original of trials and of all manner of evidence."[8] From this it follows that the law must in all cases demand the "best evidence that the nature of the thing is capable of"; for "less evidence doth create but opinion and surmise, and does not leave a man the entire satisfaction that arises from demonstration."[9] Gilbert then considers first written and secondly unwritten testimony. Written testimony consists either of public docu-

[1] Their titles are: 1. Evidence in general; 2. Witnesses in general; 3. Witnesses that are infamous; 4. Witnesses that are interested in the event of the cause; 5. Written evidence; 6. Evidence on the general issue; 7. Evidence in actions on the case on promises; 8. Evidence in actions on the case for words; 9. Evidence in actions of debt; 10. Evidence in actions of trespass; 11. Evidence in divers actions; 12. Evidence in pleas of the Crown and criminal cases.

[2] Wigmore, Evidence (1st edition) i 26.

[3] For Bathurst, who became Lord Chancellor, see above 313-314.

[4] Vol. ix 221-222; above 354.

[5] Above 352 n. 1.

[6] Law of Evidence (3rd edition) 2.

[7] Ibid 3.

[8] Ibid 4.

[9] Ibid.

ments such as records, and public matters, e.g. proceedings in Chancery, which are not of record; or of private documents such as deeds, wills, or negotiable instruments. Unwritten testimony consists of "proofs from the mouths of witnesses."[1] Gilbert considers first the rules as to the competency of witnesses, and then goes on to consider the question of the burden of proof, the mode of examining witnesses, the circumstances which may discredit a witness, and the rule that "a meer hearsay is no evidence."[2] He then states the cases in which the evidence of more than one witness is required, the rules which should be observed in weighing the credit of witnesses, and presumptions. The last, the longest, and to practitioners the most useful part of the book, is taken up with considering the evidence admissible to prove or disprove the issues in the different forms of action.[3] It is a most ably written book, and thoroughly deserves the eulogy which Blackstone pronounced upon it.[4]

Bathurst's treatment of the subject of evidence in his *Nisi Prius* is largely based upon Gilbert.[5] Later cases are added; and at the end an attempt is made to sum up the law in nine rules. We have seen that this attempt to give a systematic form to the law was premature.[6] It led some, notably Burke, to take the view that the law of evidence was very general, very abstract, and contained in a very small compass.[7] It was not till the following period that the law, and therefore the literature of this branch of the law, began to develop.

(v) *The Land Law and Conveyancing.*

The literature on this topic is considerable. There are, in the first place, one or two books of permanent importance on the land law as a whole or on certain aspects of it. In the second place, there is a group of books on conveyancing and subjects cognate thereto. In the third place, there is a group of books on particular topics in the land law. Both the books which will be noticed in this group, and some of the books in the other groups, illustrate the tendency to differentiation which is noticeable in the legal literature of this period.

(1) In 1704 George Booth published his book on *The Law of*

[1] Law of Evidence (3rd edition) 121. [2] Ibid 152.

[3] The issues dealt with are: non est factum; solvit ad diem; non assumpsit infra sex annos; non assumpsit; not guilty in ejectment, trespass, trover, in criminal cases; nullum fecit vastum, nul tiel tort, nul disseisin, nil debet per legem, and nil debet per patriam; in the 3rd edition this part of the book takes up 130 of the 289 pages.

[4] "A work which it is impossible to abstract or abridge, without losing some beauty and destroying the chain of the whole," Comm. iii 367 *note*.

[5] As Blackstone said, ibid, Gilbert's work had been engrafted into this book.

[6] Vol. ix 222. [7] Below 509 n. 7.

Real Actions.[1] It is a comprehensive straightforward statement of a difficult branch of the law. It contains forms of writs and pleadings; and the large mass of learning on the subject of these actions, to be found in the Year Book and later cases, is set out accurately and succinctly. In writing my account of the real actions in the third volume of this History I found it invaluable. When it appeared, the real actions had been almost entirely superseded by the action of ejectment and actions of trespass.[2] But they had yet many years of half-suspended animation before them, and some of them were still sometimes used.[3] Therefore a book which gave information as to the procedure in these actions, and as to the different rules of pleading which must be observed in the use of their different species, was still useful to the profession. As the author pointed out in his Introduction, though they were "much worn out of use," "yet the learning concerning them is of no small advantage for the true understanding of the original cause of many points in law that do and may occur in daily practice at this day." A knowledge of the theory of pleading in these actions was useful for several reasons. First, in this knowledge was to be found "the marrow and reason of the law" as to the nature of titles to land.[4] Secondly, a knowledge of these rules of pleading was useful in actions of trespass and replevin "when the freehold comes in question." Thirdly, "the learning of assizes holds out fully the nature of titles of entry, whereby a man may be sufficiently instructed how to manage an *ejectione firmae*, which is now the common action for recovery of lands where the entry is lawful."[5] That the book was found to be useful is shown by the fact that it was reprinted in 1811 with the annotations of serjeant Hill.

Several of the most important of Chief Baron Gilbert's numerous works on English law[6] were devoted to the land law. I have already given some account of his books on *Uses and Trusts*[7] and on *Devises and Last Wills*,[8] which are concerned both with equity and the common law. Of his other books

[1] The Law of Real Actions: in which is set forth, at large, the Nature of such Actions, and the Procedure therein; containing the Writs, Counts, Pleadings, Judgments, and all Process, both Original and Judicial in [20 named writs]. With some Records inserted particularly relating to the Court before the Justice of the County Palatine of Chester, proving the antiquity of that Court, and of some families there.

[2] See vol. vii 4-9, 21-22. [3] Ibid 22.

[4] "In this lies the marrow and reason of the law, for in such cases a man must understand the nature of titles to land, by conveyance, descent, disseisin, discontinuance, abatement, remitter, where entry is lawful, where not lawful."

[5] To succeed in an action of ejectment the plaintiff must prove that he had a right of entry, vol. vii 20-21, 61-73.

[6] Above 352 n. 1; below 369-371. [7] Above 187. [8] Above 187-188.

on the land law the most famous is his *Treatise of Tenures*,[1] which was first published in 1730 and reached a third edition in 1757.

We have seen that, at the beginning of the seventeenth century, Spelman and Zouche had introduced English lawyers to the continental learning of "feuds." [2] They had shown that in this continental learning was to be found the explanation of many of the rules of the land law, which, at first sight, appeared to be arbitrary and unreasonable. This line of thought was kept alive by the school of historical lawyers which flourished in the seventeenth [3] and eighteenth centuries.[4] In 1730 some of its results were lucidly summed up by Martin Wright, who became a baron of the Exchequer in 1739, and a judge of the court of King's Bench in 1740.[5] His *Introduction to the Law of Tenures*, which was first published in 1730 and reached a third edition in 1768, was designed to show "the original, the establishment, and the nature of tenures." [6] The book explains so much of the continental learning of feuds as was necessary to explain the rules of English law as to tenures and their incidents.[7] It then considers the question of the date when, and the steps by which, these tenures and their incidents were introduced into England ; [8] and it goes on to show what parts of these feudal doctrines of tenures were introduced into the English law, and with what modifications these doctrines had been received.[9] Wright explains from this point of view the free and unfree tenures and their incidents ; the doctrine of estates, and the manner in which the word "fee" had come "to denote the quantity of estate, and not the quality or conditions of tenure" ; [10] the old restrictions on alienation ; the rules of descent.

Gilbert's *Treatise of Tenures* supplements Wright's book. It

[1] A Treatise of Tenures, in Two Parts; containing, I. the Original, Nature, Use, and Effect of Feudal or Common Law Tenures. II. Of Customary and Copyhold Tenures, explaining the Nature and Use of Copyholds, and their particular Customs, with Respect to the Duties of the Lords, Stewards, Tenants, Suitors etc.

[2] Vol. v 19-20. [3] Ibid 402-412 ; vi 585-590, 596-597, 610-611.

[4] Below 403-409. [5] Foss, Judges viii 177-178.

[6] Introduction. [7] Chap. i. [8] Chap. ii.

[9] Chap. iii ; Wright very truly points out at the beginning of this chapter that, "though our doctrine of tenures may not exactly tally with any particular system of feuds, they are nevertheless of a feudal nature, as well as original : for though there may be many particularities in our law of tenures, that can hardly be accounted for on strict feudal principles ; yet they will in no degree affect the truth of this proposition, if it be considered, that the feudal policy did not at once prevail in the several parts of Europe, by a conquering power, or in a legislative uniform manner, but that it obtaining as a mere policy, and as such, gradually spreading itself over the Western parts of the World, was variously received, every nation so modelling it, as to preserve its principal aim, and at the same time to make it conform as far as possible with the notions of government and conditions of property . . . established in each country."

[10] At p. 150 (3rd edition) ; cp. vol. ii 351-352.

is in two parts. The first part deals with the free tenures, and the second with copyhold tenure. The first part of the book does not give a detailed account of the learning of feuds, nor does it explain the elementary learning of tenures and estates. It assumes this knowledge, and deals with the light which the doctrine of tenure sheds upon some of the more recondite and technical parts of the land law. After showing how the learning of feuds explains the law of inheritance, Gilbert goes on to show how this learning is the basis of the mass of technical rules which had accumulated round such subjects as descents which toll entries,[1] continual claim,[2] releases,[3] confirmations,[3] attornment,[4] discontinuance,[5] remitter,[6] warranty.[7] The second part of the book is an able account of copyhold tenure, which is a supplement to and a commentary upon Coke's *Copyholder*. In fact both parts of the book can be regarded as supplementary to Coke's work on the land law. We have seen that Spelman had expressed surprise that Coke had not made more use of the continental learning of feuds to explain the principles of the land law.[8] Gilbert's work supplies this gap in Coke's work with great learning and acuteness; and, because it did so, it won, as it deserved to win, great praise from Butler.[9] It is clear that both Wright's and Gilbert's books on tenures influenced the real property lawyers of the eighteenth century; and that both helped Blackstone to write the accurate and eminently readable summary of the land law which is contained in his second Book.

Gilbert wrote three other small books on topics connected with the land law. All are good clear statements of the law. The first is *A Treatise on Rents*, which was published in 1758. It goes back to the first principles of the feudal law, and it explains the main rules of the common law in the light both of those principles, and of the alterations which social changes had compelled the Legislature to make in them.[10] This historical treatment enabled

[1] Vol. ii 585; vol. vii 21.
[2] Ibid.
[3] Vol. ii 588; vol. vii 48.
[4] Vol. ii 580; vol. iii 100-101.
[5] Vol. ii 585-586; vol. vii 21.
[6] Vol. ii 587.
[7] Ibid; vol. iii 159-161; vol. vii 250-258.
[8] Original of Terms (Collected Works) (ed. Gibson) Pt. ii, 99, cited vol. v 20 n. 4.
[9] "There is no doubt but our laws respecting landed property are susceptible of great illustration from a recurrence to the general history and principles of the feudal law. This is evident from the writings of lord chief baron Gilbert, particularly his treatise of Tenures, in which he has very successfully explained, by feudal principles, several of the leading points of the doctrines laid down in the works of Littleton and Sir Edward Coke, and shown the real grounds of several of their distinctions, which otherwise appear to be merely arbitrary. By this he reduced them to a degree of system, of which till then they did not appear susceptible. . . . The same may be said of the writings of Sir William Blackstone," Preface to Coke upon Littleton xviii.
[10] As the editor says in the preface, "The teaching by the citation of determined cases, the almost universal method, is very ill suited to explain a system of law

the author to explain the law in six brief chapters,[1] and in an eminently satisfactory manner. The second is a book on a subject cognate to the subject of rent—*The Law and Practice of Distress and Replevin*—which was first published in 1757, and reached a third edition in 1794. The first chapter deals with the varieties of distress, the persons who in respect of their estates can distrain, what things are distrainable, how the distress must be used. The second and longer chapter deals with the action of replevin and its history. It gives some account of the duties of the sheriff, withernam, the writ de proprietate probanda, the learning of avowries.[2] The book gives a clear and well-arranged account of the principles of a difficult and technical branch of the law, with just so much history as is needed to make them intelligible. The third book is the book on *The Law and Practice of Ejectments*, which I have already described.[3]

Gilbert's books on the land law make a very considerable contribution to the literature of this branch of the law. They are all able summaries of the law, and some of them were regarded as so valuable that they were re-edited and brought up to date, sometimes by very eminent lawyers. Watkins edited his book on tenures, and Sugden his book on uses and trusts. The only other book which it is necessary to mention is Giles Jacob's *General Laws of Estates* [4] which was published in 1740. It deals, in the first place, with the rights and privileges of freeholders in public law ; [5] and then it deals with the principal topics of the law of real property. It gives a straightforward but pedestrian account of these topics, which is put together somewhat roughly. Probably students and landowners found it a useful book.

Since Gilbert died in 1726, all these books belong to the earlier half of the eighteenth century. The two most notable books which were published in the later half of that century are Hargrave and Butler's great edition of Coke upon Littleton, and Fearne's book upon Contingent Remainders and Executory Devises.

dependent on the ancient policy of the country, and the changes which alteration of circumstances have in later times made necessary in it, and which in fact can be only fundamentally understood by a just historical view of that policy and those changes."

[1] They are as follows: 1. What a rent service is; the different kinds of rents. 2. From what things a rent can issue, and on what conveyances they can be reserved. 3. By what words a rent can be reserved, and days of payment. 4. To whom rents may be reserved; and by what words continued to the lessor's heirs and assigns. 5. Remedies for the recovery of rent. 6. What acts of lessor or lessee amount to a discharge or extinguishment of the rent.

[2] For the history of this topic see vol. iii 281-287. [3] Above 355.

[4] The General Laws of Estates; or Freeholder's Companion.

[5] Such as the qualifications for members of Parliament and electors, for justices of the peace, for jurors, and for the killing of game.

Of Hargrave I shall speak when I deal with the topic of legal history, since his most notable services to the legal literature of this period were in the sphere of history.[1] At this point I shall deal only with his edition of Coke upon Littleton. He planned a new and elaborate edition of this work. The text was to be corrected from early printed editions, and additional references were to be given. There were to be notes on the later history of some of the legal doctrines stated by Littleton and Coke, and references to statutory alterations of the law. Coke's readings on the statute of Fines, and on Bail and Main-Prize were to be added, and also his *Copyholder*. The tract known as *The Old Tenures* was also to be added; and *The Old Tenures* and the reading on the statute of Fines were to be translated.[2] Hargrave began to publish the book in separate numbers,[3] but he was obliged to abandon it in 1785, after having completed nearly half of it.[4] It was finished by Charles Butler, and published in 1787, with a valuable preface, in which an estimate is given of the position of Littleton and Coke in our legal history, and of the place which their joint work holds in our legal literature.

Charles Butler,[5] who was perhaps the most eminent conveyancer and real property lawyer of his day, was born in 1750. Being a Roman Catholic, he could not be called to the bar. But he was able to practice as a conveyancer under the bar.[6] He studied conveyancing under Duane, who was an eminent Roman Catholic conveyancer; and it was while he was Duane's pupil that he began his life-long friendship with John Scott, the future Lord Eldon. For many years he was regarded as a leader in a branch of the profession which included such famous real property lawyers as Fearne and James Booth.[7] In 1791 he took advantage of a clause in the Catholic Relief Act which had been passed in that year,[8] and was the first Roman Catholic to be called to the bar since 1688. He did not intend to practice, and, in fact, he only argued one case in court.[9] In 1832 Brougham

[1] Below 410-411.

[2] See The Editor's Address to the Public; but the project of adding these tracts was afterwards abandoned; for the Old Tenures see vol. ii 575.

[3] Butler's Preface, p. xxiii.

[4] See Hargrave's announcement of the abandonment of the work at pp. xi-xii. Hargrave had finished his annotations on 190 out of the 393 folios of the work.

[5] D.N.B.

[6] For this branch of the legal profession see vol. vi 447-448; above 26-27.

[7] Fearne dedicated the third edition of his Essay on Contingent Remainders to James Booth to whose eminence and abilities he testifies; James Booth, like Butler, was a Roman Catholic, see Mansfield's letter to him cited Campbell, Chief Justices ii 348-349.

[8] 31 George III c. 32 § 22; it is said that Sir John Scott, then solicitor-general, was instrumental in securing the insertion of this clause.

[9] The case of Cholmondeley v. Clinton (1820-1821) Jac. and W. 1, 2 Mer. 178, which he argued before Plumer M.R. and the House of Lords; Butler's argument is reported 2 Jac. and W. at pp. 29-57.

offered him a silk gown, which he accepted, and was made a bencher of Lincoln's Inn. He died in the same year.

Besides this edition of Coke upon Littleton he edited Fearne's book;[1] and in his *Reminiscences*, and his *Horae Juridicae Subsecivae* there are valuable notes upon some of the great lawyers of his day. Moreover, he was all his life actively engaged in promoting the interests of his co-religionists; and wrote much on religious subjects. He also wrote biographical, philological, and historical works.[2] The breadth of his literary interests is illustrated by his preface to his edition of Coke upon Littleton, in which he discusses those reflections of Hotman on Littleton, which had aroused Coke's fury,[3] and contrasts the works of the foreign feudists with the English writers on the land law.

I think that there is no doubt that this edition of Coke upon Littleton is Butler's most important legal work. Both he and Hargrave used the early printed editions and the MSS. to produce a perfect text; and they incorporated into their notes the notes of Hale and Nottingham.[4] Their own notes show a complete mastery of all the authorities, mediæval and modern, which have any bearing upon the text of Littleton and Coke. They show also that the authors, in addition to being great real property lawyers, are also learned historians of the law. They are familiar not only with the Year Books and the great mediæval writers, but also with the modern cases and the works of such historians as Selden, Spelman, and Madox. Good illustrations of the important contributions to legal knowledge which they made are to be found in Butler and Hargrave's long notes on feuds,[5] and in Butler's notes on conveyances,[6] and on leading points in the law of trusts affecting real property.[7] We have seen that it was Butler's note on seisin[8] which decisively refuted the theory of seisin which Lord Mansfield had put forward in the case of *Taylor v. Horde*.[9] The book is a testimony to the high standard of learning and scholarship to which the best lawyers of this century attained, and to the literary quality of their work.

Charles Fearne (1742-1794),[10] like Butler, was one of the great real property lawyers of this century. His father was the judge advocate who had presided at the trial of Admiral Byng. He was a man of many interests. He dabbled in inventions,[11] and was

[1] Below 374-375. [2] For the long list of these works see D.N.B.
[3] See vol. v 466 n. 4; 10 Co. Rep. Pref xv-xviii.
[4] See Hargrave's Preface v-vi, and Butler's Preface xxiii-xxv.
[5] Note 77 to f. 191*a*; above 369, 370. [6] Note 231 to f. 271*b*.
[7] Note 249 to f. 290*b*. [8] Note 285 to f. 330*b*.
[9] (1757) 1 Burr. 60; vol. vii 44. [10] D.N.B.
[11] Butler tells us, Reminiscences i 118, that "he had obtained a patent for dying scarlet, and had solicited one for a preparation of porcelain. A friend of the Reminiscent having communicated to an eminent gun-smith, a project for a musket,

both a classical and a mathematical scholar. But he abandoned his classical studies, and settled down to conveyancing and the study of the law of real property.[1] He made his name by his classic *Essay on Contingent Remainders and Executory Devises*, and acquired a large conveyancing practice.[2] He lost his practice by not attending to it; and, since he had lived extravagantly, he was obliged, at the end of his life, to accept help from his friends. He published also an *Historical Legigraphical Chart of Landed Property in England, from the time of the Saxons to the present era, displaying the Tenures, mode of Descent, and power of Alienation of Lands in England, at all times, during that period;*[3] and a collection of miscellaneous papers was published after his death in 1796 by his pupil T. M. Shadwell.[4] But the only one of his works which need be noticed is his famous Essay.

The first edition, published in 1772, was a slim tract of 98 pages. In the second edition, published in 1773, it had expanded to 178 pages, and in the third, published in 1776, to 450 pages. In 1791 Fearne published a new edition of that part of the work which deals with contingent remainders. It ran to 558 pages. He included in this edition a copy of an opinion on the will in the case of *Perrin v. Blake*, which Mansfield had given when he was solicitor-general, and also the opinions of other counsel. He took this action to establish the authenticity of Mansfield's opinion, because he had referred to it in his first edition, and Mansfield had disavowed it.[5] Fearne died before he could complete a new edition of that part of his work which deals with

of greater power and much less size than that in ordinary use, the gun-smith pointed out to him its defects, and observed, that 'a Mr. Fearne, an obscure law-man, in Bream's-buildings, Chancery lane, had invented a musket, which although defective was much nearer to the attainment of the object.'"

[1] Butler tells us, Reminiscences i 118, that he had composed treatises in Greek on the Greek accents and on the Retreat of the Ten Thousand; and that "when he resolved to dedicate himself to the study of the law, he burned his profane library and wept over its flames."

[2] In the argument in Cadell v. Palmer (1832-1833) 1 Cl. and Fin. at p. 399 it is said that, "if any man studied this subject more diligently than another, it was Mr. Fearne, who, on account of his profound study and knowledge of it, was more consulted than any man of his time."

[3] Butler says of this Chart, in the Preface to the 7th ed. of Fearne's Contingent Remainders, that, "it is engraved and printed on a broad sheet and coloured. It was first published in 1769, and afterwards in 1791. A person acquainted with the subject, or who uses it as a kind of Analytical Table to an approved author, whose work he is perusing, will find it a performance of great ingenuity and most minute accuracy."

[4] Besides cases and opinions, it includes the reading on the Statute of Inrollments delivered in 1778 at Lyons Inn, and the case of General Stanwix; General Stanwix and his daughter had perished in the same shipwreck, and the question, as between their representatives, was whether either could be presumed to be the survivor; the case was compromised; but Fearne for his own amusement composed these arguments for the two claimants, Butler, Preface to the 7th ed. of Fearne's Contingent Remainders.

[5] Ibid; cp. Campbell, Chief Justices ii 434-437, for a full and interesting account of this episode.

executory devises. This new edition was published in 1795 under the editorship of J. J. Powell. The sixth to the ninth editions of both parts of Fearne's work (1809-1831) were carefully edited by Charles Butler. The tenth and last edition was edited by J. W. Smith in 1844. The number of editions through which the book has passed is the best evidence of its merits. "No work," said Butler, "on any branch of science, affords a more beautiful instance of analysis"; [1] and it is regarded by the courts, almost, if not quite, as a book of authority. There is no doubt that Fearne reduced to order, and gave logical form and consistency to, two of the most difficult topics in the old law of real property. All lawyers who have had occasion to deal with these topics owe Fearne a large debt—as I can testify, and as the third and seventh volumes of this History show.

(2) A large number of books on conveyancing were published during the eighteenth century, of which it is only necessary to notice a few representative specimens. These books fall into two main groups. First there are books which are simply collections of precedents in conveyancing; and secondly there are books which combine with these collections information as to the nature of conveyances and the theory of conveyancing. In both these groups the books tend to grow in size; and they generally include precedents for the conveyance of stocks and shares and other forms of personal property, and also precedents of documents used by merchants.

(i) A book of precedents entitled *The Modern Conveyancer* had been published in 1690. Two volumes, forming a second Part, were added in 1704.[2] The precedents are grouped under alphabetical headings, running from "Annuities" to "Wills." The fact that the number of these books of precedents was increasing is illustrated by a curious little work entitled *The Conveyancer's Assistant and Director*.[3] Various clauses, which were necessary in conveyances of different kinds, were grouped under alphabetical heads; and for a precedent of these different clauses the reader is referred to one of ten books of precedents.[4]

[1] Preface to the 7th edition; Butler facilitated the study of the work by subdividing the text, by leaving spaces between each proposition, and by summarizing in a note the effect of Fearne's propositions.

[2] The Second Part of the Modern Conveyancer, or Conveyancing Improved. Being a Choice Collection of Precedents on most Occasions, Drawn after the manner of Conveyancing now in use by the greatest Hands of this present Age. To which are added Opinions of several learned Council relating to Conveyancing and other Matters in Law.

[3] The Conveyancer's Assistant and Director. Being a Treatise containing Titles to all sorts of Conveyances.

[4] The books are: West, Symboleography; Herne, Modern Conveyancer; the New Books of Instruments; Perfect Guide for a Studious Young Lawyer; Clark's Vade mecum; Arcana Clericalia; Scrivener's Guide; Bridgman's Conveyances; Modern Conveyancer; Compleat Conveyancer.

In addition to this index to these books of precedents, short notes of relevant cases are given under each head. The book was published in 1702. Probably it was useful when it was first published. But it must have lost its usefulness as new and more elaborate books of precedents were published. Many such collections continued to be published all through the century.[1] For instance a considerable collection in three folio volumes was published in 1744, and reached a fourth edition in 1785. The precedents were "settled and approved by Gilbert Horsman late of Lincoln's Inn and other eminent counsel." The preface informs us that there are included, not only precedents for the conveyance of estates real and personal, but also for the conveyance of "stocks, bonds, and annuities of the publick companies, exchequer annuities, fortunes in Ireland and Holland and the plantations in America"—"materials which have introduced an additional language into conveyancing." The precedents are arranged under forty-two alphabetical heads from "Acquittances" to "Wills and Codicils."

(ii) John Lilly, who had enlarged and brought up-to-date Style's *Practical Register*[2] and had edited a book of reports,[3] published in 1719 his *Practical Conveyancer*. Part I contains "rules and instructions for drawing all sorts of conveyances of estates and interests whether real or personal, in possession or expectancy." It gives this information under thirty-six alphabetical heads from "Assignments" to "Uses." In effect it is a digest of practical information as to the significance of the usual clauses in conveyances, and the relevant legal principles, with full references to the cases and other authorities. Part II consists of a collection of precedents. They are a varied collection, since they include, besides the ordinary conveyances of interests in real property, a settlement of stock, the assignment of a debt, compositions with creditors, an agreement between a high sheriff and his under-sheriff, an agreement between a bishop's register and his deputy, and even a precedent for a private Act of Parliament for the settlement of an estate.[4]

A larger book of the same kind[5] was published in 1749, under the editorship of J. Worrall the publisher,[6] in three folio volumes. The first volume contains an exposition in eight chapters of the theory of conveyancing, and a full account of the different

[1] See L. F. Maxwell, A Bibliography of English Law ii 149-155.

[2] For this book see vol. vi 598; for Lilly's work on this book see J. D. Cowley, A Bibliography of Abridgments (S.S.) liii; Lilly enlarged it in 1710, and "it was further enlarged out of all recognition by the same editor in 1719 and became known as Lilly's Abridgment."

[3] Above 109.

[4] For these estate Acts see vol. xi 619-621.

[5] A Compleat Body of Conveyancing in Theory and Practice, by Edward Wood. Gent. deceased.

[6] Preface to the 1st edition.

kinds of conveyances.[1] It was compiled by a Mr. Salthouse, "from all the books of best authority and repute in the law."[2] The other two volumes contain a collection of precedents of "all deeds and instruments any ways requisite in mercantile, maritime, and plantation affairs," including precedents of private Acts of Parliament.[3] These precedents were taken chiefly from the collection of "the late industrious and well-known Mr. Wood during his many years' practice of draughts in all branches of conveyancing";[4] and his name appears on the title-page. The precedents are arranged under 180 alphabetical heads which run from "Acknowledgment" to "Writings"; and, like Lilly's collection, they are very varied in their subject matter. The book was successful. It reached a fifth edition in 1790-1793. That edition was edited and annotated by J. J. Powell,[5] who was probably a pupil of Fearne and was an editor of an edition of his book. He was also the author of several other very able books on subjects connected with the land laws,[6] and of a book on the law of contract.[7] A similar book was published under the editorship of W. Newnam in or about 1785.[8] It consists of three large folio volumes. The first two are an extensive collection of precedents together with the opinions of counsel on some of them; and the third contains a very exhaustive digest of the law of conveyancing. An Appendix contains Tables of the regnal years and dates of the Parliaments in each reign, a glossary of Latin surnames and place-names used in old records, and an index to records showing their nature and place of deposit.

At this point some mention must be made of the literature upon two other cognate topics. The first is the literature upon fines and recoveries, and the second is the literature upon the question of the registration of conveyances and other transactions affecting land.

First, several books were published upon the law and practice of fines and recoveries. We have seen that W. Brown, a clerk

[1] Chap. I Of Conveyancing in General; II Of the different Ways of acquiring or conveying Real Estates in particular and of claiming Titles thereto; III The different Ways of acquiring or conveying Personal Estates in particular; IV Of Deeds in general and the Things incident thereto: V Of the formal or constituent Parts of Deeds, and the Ceremonies used on the Execution thereof; VI Of the different Kinds of Deeds, Wills, and Testaments; VII Of fraudulent, forged, void, and voidable Deeds and Wills; VIII General Rules for the Exposition of Deeds and Wills.

[2] Preface to the 1st edition.

[3] Title-Page.

[4] Preface to the 1st edition.

[5] D.N.B.

[6] Below 382-383.

[7] Below 392.

[8] The Complete Conveyancer; or the Theory and Practice of Conveyancing in all its Branches. The first two volumes in the Lincoln's Inn copy are not dated, but the third is dated 1788; the edition purports to be a "new edition"; cp. L. F Maxwell, A Bibliography of English Law ii 154.

of the Common Pleas, published in 1698, in addition to books on common law and equity practice,[1] a book on the nature, operation, and mode of levying fines and suffering recoveries, together with a collection of precedents.[2] It was a successful book since it reached a second edition in 1718-1719. In 1738 R. Manby published a book which dealt almost entirely with the practical side of this branch of the law.[3] It tells us much about the various offices of the courts concerned with fines and recoveries, the fees payable, the charges made by attorneys, how to draft the necessary documents; but it tells us very little of the law and the legal principles upon which the rules of practice depended. A short tract upon fines of a somewhat sketchy character was published in 1773 by J. Chetwynd.[4] A much fuller and more learned book on recoveries was published by Nathaniel Pigott in 1739.[5] The ten chapters of the book deal clearly and comprehensively with the origin of recoveries and their nature and use; the tenant to the præcipe; who can suffer a recovery; of what things a common recovery can be suffered; single and double vouchers; what is barred by a recovery; voucher and recovery in value; the estate of the recoveror; falsifying recoveries; amendment of errors in recoveries. Its merits are shown by the fact that it reached a second edition in 1770, and a third edition in 1792.[6]

Secondly, we have seen that in the seventeenth century there had been much discussion of projects for the registration of titles[7] or conveyances.[8] Hale favoured the project of a register of conveyances;[9] and we have seen that, at the end

[1] Vol. vi 600, 616, and App. IV (1) vii, xxiv, xlvii, l.

[2] Vol. vi 604, and App. IV (3), vi; the book deals first with fines, and then with recoveries; each part consists of a good summary of the law and practice followed by a collection of precedents.

[3] The Law and Practice of Fines and Recoveries. It describes the mode of levying or suffering them not only in the courts at Westminster, but also in Chester, Lancaster, and the Great Sessions of Wales.

[4] A Treatise upon Fines; to which is added some General Observations on the nature of Deeds leading and declaring the Uses of Fines and Recoveries.

[5] A Treatise of Common Recoveries, their Nature and Use. To which is added the case of *Page* and *Hayward* . . . and also A Case between the late Earl of *Derby* and the coheirs of his Elder Brother. With *Precedents* for amending *Fines* and *Recoveries*.

[6] Both these editions were by serjeant Wilson.

[7] Vol. vi 532 and n. 9; the difference between the registration of titles and the registration of conveyances was explained by the Commissioners on Registration in 1878-1879 as follows: "That registration of titles is in the abstract to be preferred to registration of assurances may at once be conceded, for the former aims at presenting the intending purchaser or mortgagee with the net result of former dealings with the property, while the latter places the dealings themselves before him, and leaves him to investigate them for himself. In one case he finds, so to speak, the sum worked out for him; in the other he has the figures given him, and has to work out the sum for himself," Parlt. Papers (1878-1879) xi, *ix*; vol. xi 586-587.

[8] Vol. vi 610 and n. 7; vol. xi 586-587.

[9] Vol. vi 594.

of the seventeenth and the beginning of the eighteenth centuries, this agitation bore some fruit in the Acts which established registers of conveyances in Yorkshire and Middlesex.[1] But though the agitation for the establishment of a general register of conveyances continued, and though it gave rise to some abortive bills,[2] no general register of conveyances was established. But the fact that bills were introduced from time to time shows that the topic was still alive. In these circumstances it is not surprising to find that it gave rise to a certain amount of literature, which is not without interest, since it shows that some lawyers were well aware of some of the weak points of the land law, and had thought out proposals to remedy them. At the same time the existing Acts, and the literature on the subject, show that the lawyers had not as yet accurately distinguished between a register of titles or conveyances and a register of charges upon land which may not be discoverable by an examination of the title-deeds. These two species of registers are very different; and the reason why the latter species is necessary is the absence of a register of titles: [3]

> This springs from the fact that in addition to such charges and encumbrances as may be revealed by an examination of the deeds, there are a whole series of liabilities, not imposed by any deeds . . . of which a purchaser may be held to have notice, constructive or otherwise, and which therefore become binding on him. . . . Land may have been taken in execution to enforce a judgment debt, or the vendor may be an undischarged bankrupt. There may be annuities or rent-charges, deeds of arrangement, many kinds of orders of the Court, statutory charges, pending actions, easements and other rights affecting the land. None of these things may appear in the abstract of title presented by a vendor to a purchaser, yet they may cause the purchaser to be ejected from the land he has paid for, or, if he remains in possession, thrust payments or other liabilities on him, of which had he known, he would not have bought the land.[4]

The Yorkshire and Middlesex Acts did not distinguish between these two kinds of registers. They required statutes, judgments, and recognizances to be registered as well as conveyances.[5] The Act of 1777,[6] which required the enrolment of life annuities, was a recognition of the need for a register of the

[1] Vol. xi 586-587.

[2] Tyrrell, in a communication which he made to the Real Property Commission in 1829, First Report, App. 525, after noticing the proposals at the time of the Commonwealth for a general register (vol. vi 416), said that bills for this purpose were brought in in 1663, 1664, 1670, 1677, 1685, 1693, 1694, 1698, 1699, 1734, and 1758; the last of these bills was proposed by serjeant Onslow in 1816, but it did not get a second reading; at different times bills proposing county registries for Berkshire, Huntingdonshire, Derbyshire, Surrey, and Northumberland failed to pass.

[3] J. S. Stewart Wallace, the Land Charges Act in Jurisprudence, L.Q.R. xli 176-181.

[4] L.Q.R. xli 176-177. [5] Vol. xi 587. [6] Ibid 604-606.

second species—a recognition which was extended by the Judgments Acts of 1838 and 1839.[1] Naturally this confusion was reflected in the literature on this subject. A book written by Henry Collet in 1754 [2] pointed out that the existing bankruptcy Acts laid traps for a purchaser who bought from a landowner who had committed an act of bankruptcy. He advocated the project of registering all dealings with land, including recognizances and commissions of bankruptcy. But his scheme was defective in that it did not include amongst the dealings to be registered mortgages and leases at a rack rent.[3] Another proposal of a similar kind was made in 1789 by Francis Plowden, a conveyancer.[4] He criticized the imperfections of the Yorkshire and Middlesex Registry Acts, and suggested that all the existing Acts should be repealed, and replaced by an Act which provided for the enrolment of conveyances, statutes, judgments, and recognizances throughout England and Wales. He printed in his book a draft of an Act to carry out this proposal. The book gives an interesting historical account of the principle of registration, and a straightforward argument for the reasons which made it desirable. It is written in clear and untechnical language, and the author tells us that the law officers and many of the judges had approved his proposals. But they came to nothing; and it was not till after many legislative experiments had been made in the nineteenth century that the distinction between the two species of registry clearly emerged, and took shape in the Land Charges Act 1925,[5] and the Land Registration Act 1925.[6]

(3) Coke had recognized that the law of copyholds was a very distinct topic of the land law, and had dealt with it separately in one of the best of his books.[7] The fact that there was much land held by this tenure in the eighteenth century,[8] and the fact that the lords of manors might also have freehold tenants and a leet jurisdiction, produced several books written for the guidance of lords and their stewards and tenants. These books generally give a summary of the law as to copyhold tenure, and practical information as to the holding of the manorial courts. One of the earliest of these books was written by Samuel Carter, the reporter,[9] in 1696.[10] It is a good straight-

[1] 1, 2 Victoria c. 110, § 19; 2, 3 Victoria c. 11; L.Q.R. xli 178.

[2] Treatise on the Laws of England; concerning Estates in lands etc.; with some Observations on the Law of Bankruptcy.

[3] At p. 58; he suggested that it should be made a criminal offence for a landowner to sell without disclosing the mortgages to which the land was subject.

[4] Impartial Thoughts upon the beneficial consequences of Inrolling all Deeds Wills and Codicils affecting land throughout England and Wales.

[5] 15, 16 George V c. 22. [6] Ibid c. 21.

[7] Vol. v 460. [8] Vol. vii 296-297. [9] Vol. vi 552, 558.

[10] Lex Custumaria or a Treatise of Copyhold Estates.

forward piece of work, which brought Coke's book up-to-date. Another very successful book was Jacob's *Compleat Court Keeper* which was first published in 1713 and attained an eighth edition in 1819.[1] Its success was partly due to the fact that Jacob had had experience of court keeping.[2] It is a practical book designed mainly for the guidance of stewards; and for that reason it contains many forms and precedents, but comparatively little law. It is also a comprehensive book. It deals with the manner of holding the court leet, the court baron, and the court of survey,[3] the charge to the jury at the court leet, the manner of trying actions in the court baron, and an account of the powers and duties of the lord, his steward, and his tenants. A similar book, which went through four editions, was published in 1726 by Nelson,[4] the author of an abridgment [5] and sets of common law and equity reports.[6] It has an interesting historical preface, and contains an alphabetical digest of cases concerning copyholds, and an appendix of pleadings taken from actual cases. There is more law in Nelson's book than in Jacob's and less practical information. In 1735 a digest of the law of copyholds under alphabetical heads was compiled by a gentleman of the Inner Temple, and published in two small volumes.[7] It claims to give a complete summary of the common and statute law, together with practical information as to the procedure and rules of pleading in manorial courts.

Another topic which was specially treated was the law of mortgage. In 1706 Samuel Carter, the author of a work on copyholds [8] and of a set of reports,[9] wrote a book on this subject.[10] It dealt with both the legal and the equitable rules, and it included a chapter on pawns and pledges. The information given is somewhat meagre; [11] but that was not altogether the fault of the author. The rules of equity were as yet in their initial

[1] The Compleat Court Keeper: or Land Steward's Assistant.

[2] See the Dedication to the third edition.

[3] That is a court, similar to a court baron, to which the tenants brought their title-deeds for inspection by the steward; such a court was often held by the new owner of a manor, op. cit. 43.

[4] Lex Maneriorum: or, the Law and Customs of England relating to Manors and Lords of Manors, their Stewards, Deputies, Tenants, and others.

[5] Above 162. [6] Vol. vi 556, 617.

[7] The Compleat English Copyholder: or, a Guide to Lords of Manors, Justices of the Peace, Tenants, Stewards, Attornies, Bailiffs, Constables, Game-keepers, Haywards, Reeves, Surveyors of Highways, etc., being the Common and Statute Law of England, together with the adjudged Cases relating to Manors, Copyhold Estates, Courts Leet and Courts Baron, commonplaced. Some observations on the statute of 2 William and Mary Stat. 1, c. 5 as to distress are stated to be by Bartholomew Shower; for Shower see vol. vi 563.

[8] Above 380. [9] Vol. vi 552, 558.

[10] Lex Vadiorum. The Law of Mortgages. There was a second edition in 1727, and a third in 1737.

[11] A large part of the book is taken up by a collection of precedents.

stages; and it was a first attempt to write a book on this topic. Carter's book was superseded in 1785 by J. J. Powell's *Treatise upon the Law of Mortgages*. We have seen that Powell was probably a pupil of Fearne, and the editor of an edition of his book;[1] and to Fearne this treatise is dedicated. He rightly describes his book on mortgages as "a methodical arrangement of the authorities extant upon this branch of conveyancing." It is a systematic and well-arranged treatise in fifteen chapters,[2] which gives a clear account of the law, and able summaries of and comments on the cases. Its merits are proved by the fact that it reached a sixth edition in 1826.

Powell wrote two other books on special topics in the land law, which are equally able.

The first of these books, which was published in 1787, was a pioneer work on powers of appointment.[3] Powell tells us that, while writing his book on devises,[4] he found that he was obliged to consider the topic of powers of appointment; and that the topic demanded so lengthy a consideration, that he found it necessary to make it the subject of a separate book.[5] It is a systematic account of, and comment upon, authorities which up to that time had only existed in a scattered form, and had never been considered as a whole. It deals with the nature and origin of powers, the principles of the law applicable to them, and the modes in which they are carried into effect. It does not deal with the construction of powers. That, Powell explains, is a branch of the law of evidence; but in the preface to his book he gives a short but luminous account of the principles underlying the rules as to when parol evidence can be admitted to guide the court in questions of construction.[6] Sugden, whose book on powers superseded it,[7] considered it to be faulty and incomplete;[8] but he recognized that Powell had been the first to attempt to write on this branch of the law.

[1] Above 377.

[2] The chapters deal with: 1. the origin and varieties of mortgages; 2. how a mortgage is considered in equity; 3. the estate of the mortgagor; 4. the estate of the mortgagee; 5. the equity of redemption; 6. devises of lands mortgaged; 7. priority of incumbrances—tacking; 8. notice; 9. to whom lands forfeited under a mortgage belong; 10. the interest of the wife in the husband's mortgaged estate; 11. mortgages made by husband and wife of the wife's freehold, and the husband's interest in the mortgage money due to her; 12. from what funds a mortgage is to be redeemed; 13. payment of interest; 14. method of accounting; 15. foreclosure.

[3] An Essay on the Learning respecting the Creation and Execution of Powers; and also respecting the Nature and Effect of Leasing Powers, in which the Doctrine of the Judgment delivered by the Court of King's Bench in the Case of *Pugh* and the Duke of *Leeds*, and the Principal Authorities for and against it, are considered.

[4] Below 383. [5] Preface. [6] At pp. iv-xx.

[7] The first edition of Sugden's book was published in 1808.

[8] He complained that there were errors in law, and in the statements of the facts of cases, and that it showed no signs of great research, Pref. to the 1st edition; but it is fair to remember that it reached a 2nd edition in 1799.

The second of these books was a work on the law of devises.[1] We have seen that Gilbert had dealt with this subject ;[2] and other books on this topic had appeared in the course of this century. In Powell's book the subject is treated more fully than it was treated by Gilbert, as is shown by the headings of its seventeen chapters.[3] It was, as it deserved to be, a successful book, and a third edition was edited by Jarman in 1827.

The law of Landlord and Tenant was also the subject of several special treatises. Some aspects of this subject had been dealt with by Gilbert in his books on Distress and Replevin,[4] and on Rents.[5] The most popular of these books was by J. Paul.[6] The second edition of his book was published in 1775, and in 1821 it reached an eleventh edition.

(vi) *Commercial Law.*

We have seen that in the preceding period books on commercial law written by English lawyers for English lawyers had not yet begun to appear. What books there were were written either by merchants or civilians ;[7] and the books written by merchants naturally only dealt with law from the point of view of mercantile usage, and as one of the many topics upon which a merchant should inform himself.[8] During this period, and even later, books of this character continued to appear ; and I shall say something of them in the first place. But during the course of the century, and especially at its close, when the influence of Lord Mansfield's great contribution to commercial law had begun to make itself felt,[9] books of a modern type written by English lawyers for English lawyers upon various topics of commercial law, began to appear. In the second place, therefore, I shall give some account of these books.

[1] An Essay upon the Learning of Devises from their Inception by Writing to their Consummation by the Death of the Devisor.

[2] Above 187.

[3] In substance they are : 1. the power of devising at common law ; 2. devises under 32 and 34 Henry VIII ; 3. interests and estates not coming within these statutes ; 4. the devising clause of the Statute of Frauds ; 5. the devisor ; 6. things devisable ; 7. the devisee ; 8. failure of a devise ; 9. uncertainty and repugnancy appearing on the face of a devise ; 10. uncertainty on matters arising dehors the will ; 11. other causes of the failure of a devise ; 12. parol declarations and averments respecting devises ; 13. revocation ; 14. republication ; 15. jurisdiction of courts as to devises ; 16. giving a will in proof at law ; 17. proving a will in Chancery.

[4] Above 355, 371.

[5] Above 370.

[6] Every Landlord or Tenant his own Lawyer ; or, Whole Law respecting Landlords, Tenants, and Lodgers.

[7] Vol. v 131-135 ; vol. vi 606.

[8] This is the characteristic of Malynes's book, vol. v 133-134 ; the standard edition of his book, supplemented by many other legal and commercial tracts, was published in 1686, ibid 132.

[9] Below 524-542.

(1) In 1718 that prolific writer Giles Jacob produced a small book entitled *Lex Mercatoria: or the Merchants' Companion* which reached a second edition in 1729. It is a book as much for merchants as for lawyers. It deals with the law of merchant shipping, customs duties, wreck, factors, the plantations, letters of marque, prize, and piracy. On these matters it summarizes the statute law, and gives the effects of some of the cases. It also contains precedents of mercantile documents; a collection of important cases; some information as to treaties and trading companies; a summary of the laws of Oleron; and a merchants' directory. It is a clear and straightforward, though somewhat slight, piece of work. A very much more important book is Wyndham Beawes's *Lex Mercatoria Rediviva, or the Merchants' Directory*,[1] which was first published in 1751.

Beawes was his Majesty's consul at Seville and St. Lucar, and he obtained a licence from the King for the sole printing, publishing, and vending of his book for a term of fourteen years, which is printed opposite its title-page. The description of the book on the title-page shows that it was not intended to be a law book, but "a complete guide to all men in business." In fact it sets out to give all the information which a merchant trading to any part of the world could want. The comprehensive character of the book can best be seen from the table of contents which is printed in the Appendix.[2] The relevant information as to the rules of English law is to be found in the different chapters under its appropriate head, e.g. under such heads as factors, charter parties, bills of lading, insurance. This information is fuller than that contained in Malynes's work, and references are always given to the statutes, decisions, and other authorities. Besides information as to the rules of English law, it contains a little information as to the rules of international law under such heads as letters of marque and reprisal, leagues, and captures; and, under such heads as banks and bills of exchange, some information about foreign law. The author tells us that the greater part of the book was "an acknowledged collection or translation (as such general works must be) from the best authors . . . and more especially from Mons. Savary's

[1] Lex Mercatoria Rediviva: or, the Merchants' Directory. Being a complete Guide to all men in Business, whether as Traders, Remitters, Owners, Freighters, Captains, Insurers, Brokers, Factors, Super-cargoes, Agents. Containing an Account of our Trading Companies and Colonies, with their Establishments, and an Abstract of their Charters; the Duty of Consuls, and the laws subsisting about Aliens, Naturalization, and Denization. To which is added, a State of the present general Traffick of the whole World; describing the Manufactures and Products of each particular Nation: and Tables of the Correspondence and agreement of the European Coins, Weights, and Measures, with the addition of all others that are known.

[2] App. V.

Dictionaire de Commerce"; but that the information so acquired had been corrected by a "thirty years' practice, more than half spent abroad."[1] It was a useful and successful book. It reached a third edition in 1771; and a sixth edition, edited by Joseph Chitty, was published in 1813.

A book of a similar kind was written on the topic of insurance by Nicholas Magens, a German merchant resident in London.[2] It was written in German, and first published at Hamburg at the expense of the State. There was a demand for an English translation; and this demand was met by the author, who, besides translating his work, made additions and corrections to it, in order to make it more useful to his English readers.[3] He tells us that he was "encouraged to proceed in this work for the service of the public by more than one eminent judge, who had the perusal of it before it was finished." The book was published in 1755 with a dedication to Lord Hardwicke. The first volume consists of a critical statement of the law as to marine insurance, with a little information as to other kinds of insurance;[4] a series of cases illustrating the application of the law; some hints to merchants and insurers as to the risks to which trade and navigation are exposed in time of war; some diplomatic correspondence; and a comment, from a merchant's point of view, on the case of *Fitz-Gerald v. Pole*, which had been decided by the House of Lords in 1754.[5] In a second volume the author printed a collection of ordinances of different states on the subject of insurance, average, and bottomry, and a summary of the clauses in English treaties which related to commerce. This collection he regarded as of special value to English merchants, since "the business of insurance is carried to a much greater extent in London, than in any other city of Europe."[6] Moreover it would, he pointed out, be useful, if ever a much-needed codification of insurance law was taken in hand. A curious sidelight upon the conduct of the trial of

[1] Preface.

[2] An Essay on Insurances, explaining the Nature of the various kind of Insurance practised by the different Commercial States of Europe, and showing their Consistency or Inconsistency with Equity and the Public Good. Illustrated by *Real* and *extraordinary Cases*, stated at large with Observations thereon, tending to settle divers doubtful Points in making up Accounts of *Losses* and *Averages*. To which are annexed, some brief *Hints* to Merchants and Insurers concerning the Risks to which Navigation is exposed in Time of War; the King of Prussia's *Exposition* in relation to the Capture and Detention of the Ships of his Subjects by the English during the late War; the *Answer* from England to it; some remarkable *Pieces* concerning the Stopping of Ships in former Wars; and a famous *Insurance Cause* pleaded before the House of Lords, and some Mercantile Observations thereon.

[3] Preface.

[4] Insurances on the rise or fall of goods by way of wager, insurances on lotteries, against fire, on lives, on cattle, vol. i 29-34.

[5] 4 Bro. P.C. 439.

[6] Preface.

some of these insurance cases is given in the closing sentences of the preface. If, says the author, such codification were taken in hand,

> I would particularly recommend *one* not to be omitted, and that is No. 1192 in the Stockholm Ordinance, which decrees, "that anyone insulting his adversary before the Court of Insurance, either by word of mouth or writing, by mocking or railing, by defamatory accusations or gestures, he shall incur the penalty of *thirty six dollars*, and even higher." The reasons for inserting a clause of this nature are too obvious to need explaining to people who live in England, and recollect in what manner they have been sometimes treated in the course of trials in our courts.

Another book on the law of insurance published by John Weskett, merchant, in 1781, must be classed with books of this type.[1] The author had published in 1780 a *Preliminary Discourse* in which he set out the reforms which were needed in this branch of the law.[2] Both in order to facilitate these reforms, and in order to present a clear account of the present state of the law, the author compiled this digest, which is arranged under alphabetical heads, beginning with "Abandonment" and ending with "Written Clause." He had studied both English and foreign authorities. But it is simply a digest of case law, statute law, the laws of foreign countries, and other information. No attempt is made to extract and state the principles of the law. It is a book for merchants rather than lawyers. To merchants it was no doubt useful, since it gave them in an accessible form the information legal or otherwise, which they needed. To lawyers it must have been less useful, since the legal information is interspersed with much unnecessary miscellaneous information.[3]

A belated specimen of these discursive works on commercial matters was written by Joseph Chitty—the author of many law books and the founder of a famous legal family. The book, which is in four stout volumes, is entitled *A Treatise on the Laws of Commerce and Manufactures*,[4] and was published between 1820 and 1824. It deals with commerce from every point of view—from the point of view of constitutional law, of international law, of the statute law affecting various branches of trade, of the revenue laws, of common law and equity and admiralty law. It gives information as to colonies and commercial companies; and as to ports, lighthouses, pilots, quarantine, convoys, wrecks, and

[1] A Complete Digest of the theory, Laws, and Practice of Insurance; compiled from the best Authorities in different Languages in Alphabetical Order.

[2] Preface.

[3] E.g. information as to the various fire offices, as to the Amicable Life Assurance Society, as to naval architecture, as to mercantile practice in valuations for insurance purposes.

[4] A Treatise on the Laws of Commerce and Manufactures, and the Contracts relating thereto. With an Appendix of Treaties, Statutes, and Precedents.

piracy. Dealing with domestic trade, it discusses highways, canals and railways, fairs and markets, hawkers and pedlars, weights and measures, restraints on trade imposed by the prerogative or statute, forestalling, conspiracies, and other injuries to trade, rules as to many different manufactures, and the law of master and servant. Having dealt with these aspects of trade, a transition is then made to the principles of commercial law. First the law of contract is dealt with; then the law as to agents, factors, and brokers; partnership; contracts of manufacture, sale, exchange, and loan; suretyship; stoppage *in transitu;* bailment; the law of merchant shipping; insurance; liens; negotiable instruments. Lastly, an account is given of the law as to the remedies open to an aggrieved person, first for violations of international law, and then for violations of municipal law. Under this head the author treats of arbitration, set off, the statute of limitations, and bankruptcy. The last volume contains a large collection of precedents applicable to commercial transactions. Though it is much more definitely a law book than the treatises of Malynes and Beawes, in the variety of the information which it gives, it somewhat resembles them. It can be regarded as a connecting link between these treatises and books of the modern type. But some time before its publication these books had, as we shall now see, begun to make their appearance.

(2) The earliest topic of commercial law upon which books written by English lawyers for English lawyers began to appear is the topic of bankruptcy. We have seen that one or two books on this topic had appeared in the seventeenth century.[1] In the eighteenth century the statute law and the case law were growing in bulk and complexity,[2] so that there was a demand for books which would summarize their effect. The following books are samples of a considerable literature on this topic.

In 1761 a commissioner of bankrupts published in two small volumes *A General System of the Laws concerning Bankrupts.*[3] It was meant for "the practising solicitor."[4] and was divided into two parts. The first and longest part deals in thirty-five short chapters with the law; and the second with practical instructions for suing out a commission of bankruptcy, together with precedents of all the formal documents which were required.

[1] Vol. vi 606, and App. IV (5) i, vii, ix. [2] Vol. xi 445-447.

[3] A General System of the Laws concerning Bankrupts; containing every case that may happen either to a Bankrupt, Creditor, or Assignee; with full instructions from taking out a Commission to the making a final Dividend; together with approved precedents of Affidavits of Debt, Bond, Petition, Commission, Memorandums, Depositions, Claims, Assignments, Bargain and Sale, Petitions, Orders of Dividend, Certificate, and whatever else is necessary to be reduced into writing under a Commission.

[4] Preface.

The relevant statutes are set out under each head, and one or two illustrative cases are cited. The book was no doubt useful to practitioners, but it is a very pedestrian summary.

A much better book, which reached a fourth edition in 1780, was published in 1769 by Edward Green.[1] After a prefatory discourse on the powers, duties, and liabilities of commissioners of bankrupts, the author tells us, in a short introduction, something of the modern as contrasted with the earlier view of the bankruptcy statutes,[2] and explains why they are confined to traders.[3] Then he deals in eight chapters with the law and practice, and adds a large collection of precedents. The book is clearly written and well arranged. It states the effect of the modern cases and statutes; but it is not a mere digest. It explains underlying principles, and gives a good account of the way in which the commissioners in practice conducted their business.

In 1783 J. B. Burges wrote a book of an historical and critical character on the law of insolvency.[4] The first part contains an historical statement of the law as to insolvency; the second part a similar statement of the law of bankruptcy; and the third part some sensible suggestions for the reform of the law. The author attacks the law as to imprisonment for debt,[5] and the incompetence of the commissioners in bankruptcy.[6] He gives good reasons for thinking that it is a mistake to make only traders subject to the law of bankruptcy, and, consequently, to have a separate set of rules for insolvents who are not traders, and bankrupts who are traders. The only distinction, he maintains, should be between debtors who are bankrupt and those who are not bankrupt. He gives good reasons for thinking that the result of the law was that in many cases an honest insolvent was victimized, while a dishonest bankrupt escaped with his illgotten gains.[7] The soundness of his suggestions for reform can be seen from the fact that very many of them have been adopted by the Legislature in the nineteenth century.

[1] The Spirit of the Bankrupt Laws. Wherein are principally considered the Power and Authority of the Commissioners. . . . With Precedents and Instructions.

[2] The earlier Acts were aimed at the fraudulent bankrupt, and considered bankrupts to be a species of criminal, vol. viii 236-237, 243-244; but now, says Green, the laws are "calculated for the benefit of trade and founded on principles of humanity as well as justice; and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself."

[3] He says that they apply only to traders because they are the only persons "liable to accidental losses, and to an inability of paying their debts without any fault of their own"; and because "the law holds it an unjustifiable practice for any person but a tradesman to incumber himself with debts of any considerable value."

[4] Considerations on the Law of Insolvency with a Proposal for Reform.

[5] Vol. xi 595-600.

[6] As to this see vol. i 471-472.

[7] At p. 316; see pp. 332 seqq. for a good account of the methods employed by the fraudulent bankrupt of the day.

The other two topics of commercial law upon which law books of a modern type were beginning to appear were negotiable instruments and insurance.

In 1760 T. Cunningham, the author of a law dictionary,[1] of a history of the Inns of Court, of a history of the customs,[2] of a set of reports,[3] and other works, published a book on negotiable instruments and insurances.[4] The first chapter deals with bills of exchange in twelve sections; the second chapter with promissory notes, cash notes, and goldsmith's notes in six sections; the third chapter deals with insurances in thirteen sections; the fourth chapter deals with foreign exchanges. The book has some of the characteristics of the older books written by the merchants. There is, for instance, some miscellaneous information about the different marine, fire, and life insurance offices, and their methods of business; and the last chapter gives more mercantile than legal information. But it is definitely a law book. The greatest part of the book deals with negotiable instruments and insurances from a purely legal point of view, and states and discusses, sometimes at considerable length, the relevant cases, statutes, and other authorities. Thus there is a long account of the case of *Fitz-Gerald v. Pole*—the case which had attracted the attention of Magens.[5] Considering that it is a pioneer book, it is a creditable piece of work. The arrangement is clear, and some of the important principles are stated. Its principal fault is that, under the different sections, summaries of the facts and the points decided in many cases are given, without indicating the principle which those cases are supposed to illustrate. Many pages of the book are a digest of cases rather than a reasoned exposition of the law.

The best book upon bills of exchange was written by John Bayley,[6] a very learned lawyer who became successively a most respected judge of the court of King's Bench and a baron of the Exchequer.[7] The first edition of the book was published in 1789. It was, as the author said, "a collection of principles only, and did not state the cases from which those principles

[1] Above 177. [2] Above 348. [3] Above 120.

[4] The Law of Bills of Exchange, Promissory Notes, Bank Notes, and Insurances, containing All the Statutes, Cases at large, Arguments, Resolutions, Judgments, Decrees, and Customs of Merchants concerning them, methodically digested. Together with Rules and Examples for computing the exchange between England and the principal Places of Trade in Europe.

[5] Above 385.

[6] A Summary of the Law of Bills of Exchange, Cash Bills, and Promissory Notes.

[7] Foss, Judges ix 75-78. Foss at p. 75 says, "the author of these pages, who is old enough to have advised with him when a sergeant, has been a witness of his whole subsequent career, during which he never heard one word to his disparagement."

were deduced." In the later editions the relevant statutes and cases were added.[1] The subject is dealt with in six chapters. The first deals with the definition of bills and notes, their form, and obligation; the second, with their transfer; the third, with the acceptance of bills; the fourth, with presentment for acceptance or payment, and notice of non-acceptance or non-payment; the fifth, with remedies in case of non-acceptance or non-payment; and the sixth, with the evidence which a plaintiff must produce, and with the defences which a defendant may set up. The clearness and conciseness with which the law is stated shows that the author is a complete master of the principles underlying it. That it was long the standard book on the subject is shown by the fact that it reached a sixth edition in 1840. Another book on the same subject was published in 1791 by Stewart Kyd, the author of a book on corporations.[2] It was said by the author to be designed more especially for merchants and students; but it is essentially a lawyer's book; and gives a good clear statement of the law.

The best text-book upon the law of insurance was published by James Alan Park in 1787.[3] Park was the son of a Scotch surgeon, and a young friend and protegé of Lord Mansfield, who, after Mansfield's retirement, used to visit him and give him an account of the proceedings in his old court. He became a judge of the court of Common Pleas in 1816.[4] Mansfield encouraged him to write the book,[5] which is, to a large extent, a summary of his decisions and those of his colleagues;[6] for, as Park explains, Mansfield, by his salutary changes in the rules for the trial of insurance cases, and by his directions to juries, had put this branch of the law on its modern basis.[7] The book deals mainly with marine insurance, but in the three last chapters, it deals with bottomry, insurances on lives, and insurances on fire. The book begins with an historical introduction intended to show the manner in which the practice of insurance took its rise in the maritime states of Europe. It then explains what a policy of insurance is, and how it is construed. It passes next to the topic of losses total and partial, and the cognate topics of average, salvage, and abandonment. Then the question of what matters will relieve an underwriter from liability is considered, and the cases in which he is liable to return the pre-

[1] Preface to the 2nd edition.

[2] A Treatise on the Law of Bills of Exchange and Promissory Notes; for Kyd see below 400.

[3] A System of the Law of Marine Insurances, with three chapters on Bottomry; on Insurances on Lives; and on Insurances against Fire.

[4] Foss, Judges ix 229-231.

[5] Ibid 229; the book is dedicated to Mansfield.

[6] Preface vi.

[7] Introduction xli-xliv; below 495, 536-541.

mium paid. Lastly the topics of procedure and evidence are discussed. Throughout all the relevant cases and authorities are cited, discussed, and distinguished, and the underlying principles are clearly stated. It was, as it deserved to be, a very successful book, and reached an eighth edition in 1842.

As yet there is no book on the law of merchant shipping—Abbott's book was not published till 1802. But John Reeves, the author of the first history of English law,[1] published in 1792 *A History of the Law of Shipping and Navigation.* It was compiled for the use of the committee of Trade and Foreign Plantations,[2] and is, in effect, a history of the Navigation Acts.[3] That history is divided into three periods—the first down to the Navigation Act of 1651, the second down to 1783, when peace was made with the United States, and the third to 1792. The book gives a clear account of the Acts, and of the manner in which they had been interpreted by the government departments which were concerned with their enforcement.[4]

(vii) *Tort and Contract.*

The fact that the working of the actions on the case had begun to produce the modern categories under which our substantive law is grouped,[5] is illustrated by two books, one of which comes from the beginning and the other from the end of this period. In 1720 an anonymous author produced a book on *Actions on the Case for Tort.*[6] The title shows that the law is in a transition stage. The law is grouped round the actions on the case and the other actions; but, as the book shows, these actions were giving rise to well-defined torts, so that it is possible to discern the first stage in the creation by the actions on the case, of a law of tort. The book is divided into five parts. The first and longest deals in six chapters with trover and conversion; the second with malicious prosecution; the third with nuisance; the fourth with deceits and warranties; and the

[1] Below 412-414.

[2] See the Dedication to Lord Hawkesbury the President of the Board.

[3] "Whatever relates to a *ship*, and its qualifications of *ownership*, or *build*, the master who commands, and the seamen who *navigate* it, the *goods* and *commodities*, and the *places* from which it may import by virtue of such qualifications; all these are peculiarly the subjects of the present History. . . . But any incidents and circumstances relating to that trade and commerce, and not originating from, or belonging to, the precise nature of such qualifications of the *ship* and its *navigation*, are extraneous and foreign," pp. 2-3; for the Navigation Acts see vol. vi 166, 316-319, 321-323, 425; vol. xi 84-92, 407-411, 434-438.

[4] Reeves says at p. 5 that "all the cases to be found in the printed books . . . do not exceed ten"; and he says that their interpretation must be looked for in the opinions of the law officers given to the Board of Customs, at p. 9.

[5] Vol. vi 637-640.

[6] The Law of Actions on the Case for Torts and Wrongs; being a Methodical Collection of all the Cases concerning such Actions.

fifth with actions on the common custom of the realm against innkeepers, carriers, etc. It contains a good digest of the cases on each of these five topics; and to each of the five parts are appended precedents of pleading. The other book, which was published in 1790, is an *Essay on the Law of Contracts and Agreements* by J. J. Powell, the author of books on Mortgages, Powers, and Devises.[1] It was, as the author said, the first book on the law of contract. It is an able book, and it covers the ground fairly completely. But it is not very well arranged. The author, as his other books show, was primarily an equity-practitioner; the second volume of his book is for the most part an account of the different kinds of jurisdiction exercised by equity in relation to contracts;[2] and throughout the book the information as to the treatment of contracts by equity is fuller than the information as to their treatment by the common law. But, like the author's other books, it is much more than a mere digest of the cases. In all cases the author tries, with considerable success, to state principles, and to illustrate them by the cases. That it was not very well arranged or well balanced was perhaps inevitable in a first book on the subject.

(viii) *Special Branches of the Law.*

The growing elaboration of the law was the reason why books on special branches of the law began to multiply during this period. I shall notice a few specimens arranged roughly under alphabetical heads.

The growing practice, especially amongst merchants, of submitting their disputes to arbitration, which was encouraged by the statute of 1697-1698,[3] produced several books on the law of *Arbitration and Awards*. The first of these books, by the author of *Regula Placitandi*[4] was published in 1694.[5] The author warns arbitrators that they

> must keep themselves within their jurisdiction and their awards must be measured by the rules of law. 'Tis true they are not so tied up to formalities as our lawyers; notwithstanding there are many things which must be observed to make their arbitraments good and effectual.[6]

[1] Above 382-383.

[2] The first thirteen pages deal with remedies to enforce contracts at law and in equity; the rest of the volume deals with the equitable jurisdiction in decreeing equitable contracts; the equitable jurisdiction as to relief against unreasonable contracts; principles on which the court of equity refuses to interfere in cases of contract.

[3] 9 William III c. 15; vol. vi 635.

[4] Ibid 600.

[5] Arbitrium Redivivum: or the Law of Arbitration; collected from the Law Books both Ancient and Modern, and deduced to these times. . . . With several Forms of Submission by way of Covenants and Bonds: as also several forms of Arbitraments or Awards.

[6] Preface.

It is a very slight book of only ninety-three pages, twenty-seven of which are precedents. A more considerable book was published by Mathew Bacon, the author of the Abridgment,[1] in 1731.[2] The author points out that a book on this subject was needed because the complexities of the law often made a recourse to arbitration desirable, and because, on that account, the judges sometimes advised litigants to take this course. It is a good straightforward and up-to-date account of the law. That it was found to be useful is shown by the fact that it reached a third edition in 1770. The best book on this subject was published by Stewart Kyd in 1791.[3] It is a learned book, which describes historically the growth of the rules on this topic from the Year Books downwards, and discusses intelligently the modern cases both legal and equitable. The author knows a good deal of Roman Law, and makes an effective use of some of its rules, which, he thinks, may have influenced the growth of the parallel English rules.[4] He approves of the practice of arbitration because it enables a decision to be reached without "the unintelligible jargon of technical argumentation"; but only if the arbitrators are honest men. If they are not, it leads to still more complicated litigation. On the whole he thinks that it is chiefly useful in cases which turn on the unravelling of long and intricate accounts, in cases where the evidence is so uncertain that it is difficult to arrive at a decision, and in disputes of a trifling nature.[5]

Sir William Jones's *Essay on the Law of Bailments*, which was first published in 1781, is, as we might expect from the unique talents of its author,[6] one of the most remarkable books of this period. It is in fact an essay on a particular branch of English law, in which the author's knowledge of jurisprudence, Roman law, Greek law, Mohammedan law, Mosaic law, Hindu law, and Visigothic law, is applied to elucidate its underlaying principles. The approach to all branches of law should, he considered, be jurisprudential;[7] and, acting on this principle, he

[1] Above 169. [2] The Compleat Arbitrator; or the Law of Awards.
[3] A Treatise of the Law of Awards; for Kyd see below 400.
[4] Introduction p. 2. [5] At pp. 392-393.
[6] For an account of Sir William Jones see vol. xi 220-221; Bentham was as incapable of appreciating Jones's scholarship as he was incapable of appreciating Blackstone's; he said of Jones, Works x 121, that he was an "industrious man with no sort of genius," who "went spinning cobwebs out of his own brain and winding them round the common law"; Bentham's enemies might, with some justice, have said the same thing of Bentham.
[7] "The great system of jurisprudence, like that of the Universe, consists of many subordinate systems, all of which are connected by nice links and beautiful dependencies; and each of them, as I have fully persuaded myself, is reducible to a few plain *elements*, either the wise *maxims* of national policy and general convenience, or the *positive* rules of our forefathers, which are seldom deficient in wisdom or utility," at p. 123 (1st ed.).

treats his subject analytically, historically, and synthetically. In the analytical part he discusses the nature of the obligation of the bailee to restore the thing bailed, and the degrees of care which he ought to take of it in different classes of cases.[1] In the historical part he compares the rules of English and Roman law, distinguishing the classical Roman law from the law laid down by the modern civilians.[2] In the synthetical part he states the rules of modern English law.[3] Though he says of Blackstone's Commentaries that they are "the most correct and beautiful outline that ever was exhibited of any human science," he justly criticizes Blackstone's treatment of the subject of bailments on the ground that it is both inadequate and so loosely expressed as to be misleading;[4] and he also criticizes,[5] not perhaps so justly,[6] Holt, C.J.'s famous classification of bailments in the case of *Coggs v. Bernard*.[7] On the other hand, his view that that case was not really a case of contractual liability—the reward was not the essence of the action—but of delictual liability, is correct,[8] The book won high praise from Story,[9] and its authority is recognized by Smith in his note on *Coggs v. Bernard*.[10] It is unfortunate that other interests prevented its author from pursuing his plan of doing for other branches of English law what he had done for the law of bailment.[11]

In 1770 serjeant Sayer, encouraged by the success of his book on the law as to costs,[12] published a book on the law of *Damages*. It is a small book in thirty-six short chapters. It covers a good deal of ground, but the information, though clearly stated, is rather meagre. No doubt this was due to the fact that this branch of the law was not as yet very well developed.

The growing complexity of the *Game Laws* created the need for a book on this subject, which was met by John Paul's

[1] At pp. 5-11. [2] Ibid 11-116. [3] Ibid 117-122.

[4] "He represents *lending* and *letting to hire*, which are *bailments* by his own definition, as contracts of a *distinct species*; he says nothing of employment by *commission*; he introduces the doctrine of a *distress*, which has an analogy to a *pawn*, but is not properly *bailed*; and, on the great question of *responsibility for neglect*, he speaks so loosely and indeterminately, that no fixed ideas can be collected from his words," ibid 3.

[5] Ibid 35-36. [6] See 1 S.L.C. (13th ed.) 196-197.

[7] (1703) 2 Ld. Raym. 909.

[8] Jones, op. cit. 59-60; see vol. iii 449-450.

[9] See the citation from the North American Review vi 46-47, in D.N.B.

[10] 1 S.L.C. (13th ed.) 196.

[11] "Should the *method* used in this little tract be approved, I may possibly not want inclination, if I do not want leisure, to discuss in the same form *every* branch of *English* law, *civil* and *criminal*, *private* and *publick*; after which it will be easy to mould into distinct works, the three principal divisions, on the *analytical*, the *historical*, and the *synthetical*, parts," at p. 123.

[12] Preface; above 356.

book, published at some date before 1775.[1] It was a successful book, since it reached a fourth edition in 1816. After a short introduction as to property in animals, it sets out in chronological order the relevant statutes, first as to forests and chases, secondly as to four-footed game, thirdly as to winged game, and fourthly as to sea and river fish. In an appendix the author sets out the qualifications for taking game, precedents of indictments, warrants, deputations, etc., and an abstract of the statutes for the protection of hares, partridges and pheasants.

In 1785 Peter Lovelass produced a book on the law of *Intestate Succession*.[2] It deals with the grant and revocation of letters of administration, the powers and duties of the administrator, the persons entitled under the statutes of Distribution, the descent of real property, and the customs of London and the Province of York. It is a good straightforward account of the law of intestate succession, and of the administration of the estates of intestates. The leading books and cases are referred to, and the information is given shortly and clearly. In the following year he published a more elaborate book which dealt both with the law of intestate succession and with the law of wills and executors and administrators.[3] Though it was intended for laymen it treats the subject in some detail, and cites authorities. On the other hand a rival work by T. E. Tomlins [4]

[1] A Digest of the Laws relating to the Game of this Kingdom: containing all the Statutes now in Force, respecting the Forest Laws, and the different species of Game, including those which have been made for the preservation of sea and river fish. With an Appendix giving some General Observations on the Game Laws. The edition of 1775 is the second edition; there was a third edition in 1780; the author mentions in his preface a book by Richard Burn on this subject which is not in the British Museum Catalogue; he describes it as being an abstract of the statutes, and says that it does not mention the forest laws, some account of which is, he rightly says, needed to understand the game laws.

[2] The Will which the Law makes . . . showing in a plain, easy and comprehensive manner, how a Man's Family or Relations will be entitled to his Real and Personal Estate, and how the same is subject to the discharge of his debts: Likewise How the Debts are paid by the Administrator, and to whom the surplus of the Personal Estate is to be distributed pursuant to the Statute 22 and 23 Car. II and 1 Jac. II and the Customs of the City of London and Province of York.

[3] The Law's Disposal of a Person's Estate who dies without Will or Testament. . . . To which is added the Disposal of a Person's Estate by Will and Testament; containing an explanation of the Mortmain Act, and instructions and necessary Forms for every Person to make, alter, and republish his own Will, likewise directions for Executors, how to act after the Testator's death, with respect to proving the Will, taking upon them the Executorship, getting in the Effects, and paying Debts and Legacies.

[4] A Familiar Plan and Easy Explanation of the Law of Wills and Codicils and of the Law of Executors and Administrators. And also the rules by which Estates Freehold and Copyhold and Personal Estates in general descend, and are to be distributed, in case no Will is made. With instructions to every Person to make his own Will; the necessary Forms for that purpose, and the expense of obtaining Probates and Letters of Administration. The whole written as much as possible without the use of Law Words or Terms. The Prefaces to Lovelass's fourth edition and Tomlin's third edition show that neither author welcomed the other's book, and that each was critical of the other's work.

is less technical, cites no authorities, and was perhaps easier for a layman to understand. That both books met a want is shown by the fact that Lovelass's book reached a twelfth edition in 1838, and Tomlins' a seventh edition in 1819.

Earlier in the century two books on the subject of *Wills* had appeared. The first is a short book divided into thirty chapters which was published in 1703.[1] It deals with wills of both realty and personalty; but the greater part of the book (Chaps. vii-xxvi) is taken up by a discussion of devises and their interpretation. The cases and statutes are digested under each chapter heading without any attempt at logical arrangement. The second was written by R. Richardson,[2] the author of *The Attorney's Practice*.[3] It was published in 1744 and reached a second edition in 1769. It gives a clear summary not only of the law as to Wills, but also of the law as to executors and administrators, and of the law of intestate succession. Wills and legacies are the topics which are the most fully treated; but the summary of the law on the other topics, though slight is clearly written. The thorny subjects of executory devises, and the rules centering round devises of freeholds and terms of years, are successfully dealt with. The author points out[4] that the law of executors and administrators needs reform. As matters stand, he says, the knave can cheat with impunity, and the honest man is scarcely ever safe; while to seek the advice of the court of Chancery is "too expensive for a moderate fortune to bear." These subjects are on the borderline between the spheres of practice of the common lawyers and the civilians; and we shall see[5] that in this, as in earlier periods,[6] books written by the civilians contributed to their elucidation.

The prominence into which the law of *Libel* was brought in the second half of the century was the occasion of two very inferior books on this subject. The first of these books which was published in 1764, was called forth by the litigation connected with Wilkes, and it deals mainly with libel considered as a crime.[7] On libel considered as a tort it is both slight and inaccurate, e.g. it is said that truth is a defence to an action for slander but not to an action for libel.[8] It is clearly written, but neither well balanced nor learned. The second of these books, which was published in 1785, is a short tract by Capel Lofft, the reporter,[9] which was called forth by the controversy as to the right of the

[1] Of Last Wills and Testaments: A Common Law Treatise.
[2] The Law of Testaments and Last Wills.
[3] Above 360.
[4] Preface.
[5] Below 619-620.
[6] Vol. v 14-15.
[7] A Digest of the Law concerning Libels: Containing all Resolutions in the books on the Subject, and many Manuscript Cases. The whole illustrated with occasional Observations.
[8] At p. 16.
[9] Above 139-140.

jury, in a prosecution for libel, to give a general verdict.[1] It is rather pretentious and verbose ; and like the first of these books, it is slight and inaccurate on libel considered as a tort, e.g. the author tells us that an action for libel does not lie unless special damage is proved.[2]

During the century two anonymous books were published on the law of *Master and Servant.* The first of these books, which was published in 1755, is a short digest of thirty statutes beginning with 22 Henry VIII c. 4 and ending with 27 George II c. 7.[3] The statutes are arranged chronologically, and there are a few notes on 5 Elizabeth c. 4. It cannot have been of much use either to the layman or the lawyer. The second of these books, which was published in 1767, is a comprehensive and well-arranged little book.[4] After a preface in which the author argues for the thesis that, as slavery is not recognized by the law of England, a negro is free as soon as he comes to England,[5] he discusses the law under the following four heads : menial servants, clerks to attornies and solicitors and clerks in Chancery, apprentices, and labourers. Under the last head he gives some information as to wages and as to the statutes dealing with particular industries.

The three connected subjects of *Pawnbrokers, Usury, and Life Annuities* were dealt with in several books. A short book published in 1745 deals with the law as to pawnbrokers and usury.[6] It is a short digest in twenty-three paragraphs of the relevant cases and statutes. We have seen that the practice of granting life annuities was so much resorted to in order to evade the usury laws that it had been to some extent regulated by a statute of 1777.[7] A very good book on usury and life annuities was published by Francis Plowden in 1797.[8] He points out in his introduction that the practice of granting these annuities, in order to evade the usury laws,[9] was so

[1] An Essay on the Law of Libels. With an Appendix containing Authorities, to which are subjoined Remarks in the Case in Ireland of Attachment and the letter of the Hon. T. Erskine Esq. on that Subject.

[2] At p. 7.

[3] The Laws relating to Masters and Servants : with brief Notes and Explanations, to render them easy and intelligible to the Meanest Capacity. Necessary to be had in all Families.

[4] Laws concerning Masters and Servants, viz. Clerks to Attornies and Solicitors, Apprentices in General, Menial Servants, Labourers, Journeymen, Artificers, Handicraftsmen and other Workers.

[5] He thus anticipates Sommersett's Case which was not decided till 1771, vol. x 658 and n. 5; vol. xi 247 and n. 1.

[6] The Law concerning Pawnbrokers and Usurers : Containing all the Statutes and Cases in Law and Equity extant which relate to Pawns and Usury disposed under proper heads.

[7] 17 George III c. 26 ; vol. xi 604-606.

[8] A Treatise upon the Law of Usury and Annuities.

[9] He does not agree with Bentham's condemnation of the usury laws, at p. 150 ; and rightly, see vol. viii 100-101. 112.

prevalent, that "there are few landed estates now under settlement in this country which are not liable to some incumbrance." He deals first with the history of and the present law as to usury, and then with life annuities, explaining the law, setting out the statute of 1777, and digesting the cases which had interpreted the statute. In addition to these books there are several books which deal with life annuities and life assurances from the actuarial point of view.[1] The most elaborate of these books was published in 1783 by Francis Maseres, cursitor baron of the Exchequer.[2] Maseres was one of Charles Lamb's "old Benchers of the Inner Temple."[3] He was a mathematician, as his book shows, rather than a lawyer, a classical scholar,[4] a fellow of the Royal Society, a keen chess player, social and hospitable. He wrote many books and pamphlets besides his elaborate work on life annuities and assurances. In his early days he had been attorney-general for Quebec, in which office he had been somewhat of a failure. But he did not cease to take an interest in Canadian affairs, and his political views won for him the approbation of Bentham.[5] He died in 1824 aged ninety-three, leaving over a quarter of a million of money.

The law of *Simony* was dealt with by T. Cunningham in 1784.[6] This book is an intelligent summary of the case law and the statutes on the subject. The interest caused by the famous case of the *Bishop of London v. Fytche*,[7] of which the author gives a very elaborate account, was the reason why he wrote his book.

There is a group of books dealing with persons or bodies which occupy a special *Status* in the law. I have already noticed Brydall's two little books on lunatics and bastards.[8] The first

[1] A Treatise on Assurances and Annuities on Lives by Charles Brand (1775); The Doctrine of Annuities and Assurances on Lives and Survivorships Stated and Explained by William Morgan (1779).

[2] The Principles of the Doctrine of Life Annuities explained in a familiar manner, so as to be intelligible to Persons not acquainted with the doctrine of Chances. And Accompanied with a Variety of New Tables of the value of such Annuities and several different Rates of Interest, both for Single Lives and for Two Joint Lives. It is a large quarto of 726 pages, and considerable mathematical knowledge is needed to understand it; for the office of cursitor baron see vol. i 237.

[3] For an account of him see Mr. Justice MacKinnon's edition of this Essay 25-34; see also MacKinnon, The Murder in the Temple and other Holiday Tasks 82-83; D.N.B.

[4] In 1752 he was fourth Wrangler, and was the first to win the Chancellor's Medal for Classics.

[5] Bentham says that he was "an honest fellow who resisted Lord Mansfield's projects for establishing despotism in Canada. He occupied himself in mathematical calculations to pay the national debt, and a good deal about Canadian affairs. There was a sort of simplicity about him which I once quizzed and then repented," Works x 183.

[6] The Law of Simony: containing all the Statutes, Cases at Large, Arguments, Resolutions and Judgments concerning it.

[7] For this case see vol. i 376 n. 5.

[8] Non Compos Mentis (1700); Lex Spuriorum (1703); vol. vi 607.

of these books is small but discursive. It deals with those who are born idiots, those who become insane, insane persons with lucid intervals, and drunkards, with a digression upon the English and Roman law as to spendthrifts.[1] The second of these books is also discursive and anecdotal, and contains some classical learning as to the meaning of the term bastard and different kinds of bastards. It explains the learning of general and special bastardy, the law as to *bastard eigne* and *mulier puisne*, and gives some information as to divorce in Roman and English laws. The law relating to women had been expounded in books written in the seventeenth century.[2] Several books on this topic appeared in this century. There was a book on husband and wife which was first published in 1700 and reached a third edition in 1738.[3] It is a clear summary of the main principles of the law as to marriage, separation and divorce, the status of the married woman, and the proprietary relations of husband and wife. A similar book was published in 1732, and reached a second edition in 1737.[4] It covers much the same ground as the earlier book, and contains also precedents of conveyances of the property of married women, and the judgment of Hyde, J., in the case of *Manby v. Scott*.[5] A larger and better book on this subject appeared in 1777.[6] It is divided into four books. The first book deals with the personal status of women, the law as to marriage, and the law as to the settlement of married women who are paupers. The second book deals with the proprietary status of spinsters, wives, and widows. The third book deals with the criminal liabilities of women; and the fourth with the law of parent and child and the position of minors. The book thus covers much ground. It is clearly written, but in parts the information given is somewhat slight. A book on infants was published in 1697, and reached a third edition in 1726.[7] There was need for such a book for, as the Preface explains,

[1] Under each head the law is stated in numbered propositions styled "remarks," followed by numbered questions and answers.

[2] Vol. v 396-397; vol. vi 606-607.

[3] Baron et Feme. A Treatise of Law and Equity concerning Husbands and Wives.

[4] The Lady's Law: or a Treatise of Feme Coverts.

[5] (1663) 1 Lev. 4; 1 Sid. 109.

[6] The Laws respecting Women, as they regard their Natural Rights or their Connections and Conduct, in which their Interest and Duties as Daughters, Wards, Heiresses, Spinsters, Sisters, Wives, Widows, Mothers, Legatees, Executrixes etc. are ascertained and enumerated: also the Obligations of Parent and Child and the condition of Minors. The whole laid down according to the principles of the Common and Statute Law, explained by the Practice of the Courts of Law and Equity, and describing the nature and extent of the Ecclesiastical Jurisdiction.

[7] The Infant's Lawyer: or the Law (Ancient and Modern) relating to Infants. . . . With an Appendix of Forms of Declarations and Pleadings concerning Infants.

The law protects their persons, excuseth their laches, and assists them in their pleadings. . . . They are under the special aid and protection of his equity who is no less than the Keeper of the King's Conscience.

It deals with the subject comprehensively in twenty chapters.[1] These chapters consist of a digest of the case law relating to each head with a few explanatory comments. It was a useful book to practitioners since it covers all the topics connected with its subject.

In 1794 Stewart Kyd published a very complete and learned work on the law of Corporations. It is dedicated to Horne Tooke, and the last chapter of the book was written in the Tower of London. Kyd was a Scotchman who had settled in London.[2] He was a friend of Hardy and Horne Tooke, and had joined the Society for Constitutional Information in 1792. In 1794 he had been arrested, along with Hardy and Horne Tooke, on a charge of high treason. But on the acquittal of Hardy and Horne Tooke, the attorney-general offered no evidence against him, and he was discharged. Kyd was a learned lawyer of liberal opinions—he defended Williams who was accused of blasphemous libel because he had published Paine's *Age of Reason*. Besides this book on Corporations, and his books on Awards [3] and Bills of Exchange,[4] he published a continuation of Comyns's *Digest*. This book, like his other books, is well arranged and clearly written. After an introduction, in which different corporations are defined described and classified, the author deals in five chapters with their creation, their relations to the public, their internal constitution, their visitation, and their dissolution. All the authorities, from the Year Books downwards, are cited and discussed. It is a remarkably able pioneer treatise on this subject.

Lastly, there are two books on the *Statute Law*. The most famous of these is Daines Barrington's *Observations on the Statutes*,[5] which was first published anonymously in 1766, and reached a fifth edition in 1796.[6] Barrington was one of Charles

[1] Their titles are: Infants en ventre sa mere; Privileges of infants; Several ages of infancy; Guardian and prochein amy; Actions by infants; Actions against infants; Fines levied by infants; Common recoveries and other matters of record suffered by infants; Conveyances and specialities; Contracts, promises, and other acts of infants; Acts in law; Declarations and pleadings; Infant executors and administrators; Devises; Apprentices; Orphans (London); Trial, judgment, and execution; Remedies for torts to infants; Children's portions; Payment or tender of money for an infant.

[2] D.N.B. [3] Above 393. [4] Above 390.

[5] Observations on the Statutes, chiefly from Magna Charta to the twenty-first of James the First, chap. xxvii. With an Appendix; being A Proposal for new modelling the Statutes.

[6] Some additions and corrections were made in the later editions; but the fifth edition is only a reprint of the fourth, see the Preface.

Lamb's "Old Benchers of the Inner Temple."[1] He was the fourth son of John Shute, first Viscount Barrington, and held various offices, sinecure and otherwise. Among the latter were the offices of Recorder of Bristol and Justice of Chester. He was an antiquarian rather than a lawyer, and was a fellow and vice-president of the Society of Antiquaries and a fellow of the Royal Society. Horace Walpole and Peter Pindar made merry with one of his performances as an antiquary—the discovery of the last old woman who could speak Cornish. But he was industrious in this capacity, if not judicious, as his miscellanies show. That he was a man of some capacity the esteem in which he was held by Dr. Johnson shows. His friendship with Johnson was brought about by his book on the statutes, which Johnson so admired that he sought his acquaintance.[2] There was some reason for this admiration. Barrington had hit upon two ideas which in 1766 were original. One was that the statute book could be used to illustrate English history. The other was that the contents of the earlier statutes could be explained by the contemporary legislation of other nations. He comments on a large number of the statutes, from Magna Carta to a statute of 1623, from these points of view; and, as might be expected from a man of his antiquarian tastes, his comments are much fuller on the earlier than the later statutes. But, though he brought together much curious information as to the laws of England and of other countries,[3] it is clear that he was not a profound lawyer. He passes over such important statutes as Quia Emptores and the Statute of Uses very lightly. He is sometimes inaccurate;[4] and his credulity is shown by his belief in the story that James II's son was smuggled into the palace in a warming pan.[5] But he sometimes gives us curious pieces of information, e.g. he tells us that "a secretary of state, or his officers, claim a fee of two guineas for an answer to the judge's representation, that a criminal is a proper object of the King's mercy, upon condition of transportation."[6] His criticism of the mode of barring an entail by common recovery,[7] and his very true observations on the confused state of the statute law and his suggestions for a remedy,[8] were no doubt the reasons which induced Bentham to give very exaggerated praise to his book; and to say, very

[1] I have taken this account of Barrington from Mr. Justice MacKinnon's edition of the Old Benchers of the Inner Temple 36-42; see also MacKinnon, the Murder in the Temple and other Holiday Tasks 81-82.

[2] Boswell's Life (ed. Hill) iii 314, cited MacKinnon, op. cit. 40.

[3] His book, Bentham said with some justice, was "everything apropos of everything."

[4] Thus at p. 248 he says that Sir Thomas More was the first Chancellor "properly qualified by a legal education."

[5] At p. 8. [6] At p. 104. [7] At pp. 84-85. [8] Vol. xi 308-309.

absurdly, that he was " vastly superior to Blackstone in his disposition to improvement: more impartial in his judgment of men and things—less sycophancy and a higher intellect." [1] In spite of its shortcomings, there is no doubt that the book had its uses and its merits; and that those merits were appreciated is shown by the number of editions through which it passed.

The other book is of less importance. It was written by John Rayner in 1775; and deals with certain statutes of George II's reign.[2] The author had been a commissioner of bankrupts, but had been dismissed for unprofessional conduct—a charge which he contended in his prefatory address to the benchers of the Inner Temple was not true. In a long preface he discourses upon the old readings; upon obsolete, expired, and repealed statutes; and upon the drafting, titles, and citation of the statutes. The book contains readings on ten statutes, one of the first, and the rest of the second year, of George II's reign. The readings on each statute begin with an account of its passage through Parliament, and then there is a comment on certain of its sections, showing the aim of the section, and its effects, and setting out the cases in which it had been interpreted. The effect of subsequent legislation on the same subject is also noted. The longest comments are on the statute of 1729 for the regulation of attornies.[3] In dealing with the statute of the same year as to bribery at Parliamentary elections,[4] he tells us much about various cases of bribery which had come before the House of Commons, and some which had not; and, in his comment on the Act passed to incapacitate Bambridge, the warden of the Fleet, from holding that or any other office,[5] he gives us much information as to his iniquities. The author must have spent much labour in the compilation of his book, which contains some curious information. But it is somewhat rambling and verbose, and, except in so far as it gives an account of the cases interpreting the Acts commented upon, it cannot have had much practical use.

(ix) *Legal History.*

The tradition of learned and fruitful research into the authorities for the history of English law, which had been

[1] " He was a very indifferent judge; a quiet, good sort of a man; not proud but liberal; and vastly superior to Blackstone in his disposition to improvement: more impartial in his judgment of men and things,—less sycophancy, and a higher intellect. He was an English polyglot lawyer. . . . His book was a great treasure; and when I saw the placid little man in the Strand, I used to look at him with prodigious veneration," Works x 121, cited MacKinnon, op. cit. 38.

[2] Readings on Statutes, Chiefly those affecting the Administration of public Justice in criminal and civil Cases; passed in the Reign of his Majesty King George the Second.

[3] 2 George II c. 23; above 54-56.

[4] 2 George II c. 24; vol. x 573-574.

[5] 2 George II c. 32; vol. x 181-182.

started by Lambard in Elizabeth's reign,[1] maintained in the first half of the seventeenth century by the group of historians and lawyers who formed the first Antiquarian Society,[2] and continued in the latter half of the century by Hale [3] and Dugdale,[4] did not fail in the eighteenth century.

The study of Anglo-Saxon antiquities, which had been begun by Lambard and continued by Sommer and Henry Spelman,[5] was carried on by the learned non-juror George Hickes (1642-1715), and by David Wilkins (1685-1745). Hickes's *Thesaurus* and Anglo-Saxon and Moeso-Gothic grammar were indispensable aids to all students of the Anglo-Saxon laws.[6] His work, Maitland said,[7] showed that in linguistic science "England could as yet hold her own." Wilkins, Professor of Arabic at Cambridge, and librarian to the archbishop of Canterbury, was of Prussian descent—his real name was Wilke.[8] He produced the definitive edition of Selden's works, and he carried on Henry Spelman's work in two directions. His greatest work, the *Concilia of the English Church*, superseded Henry Spelman's work on the same subject, and is even now only partially superseded by the unfinished work of Haddan and Stubbs. His edition of the Anglo-Saxon laws incorporated Henry Spelman's *Codex Legum Veterum*. That edition included the collections of Anglo-Saxon customs which were made after the Conquest [9]—the laws of Edward the Confessor, the laws of William I, the Leges Henrici Primi. More work was done on these and other sources of the English law of the twelfth and thirteenth centuries by Robert Kelham (1717-1808).[10] Kelham practised as an attorney in the court of King's Bench till 1792, and compiled an index to abridgments.[11] But his real interest lay in the antiquities of English law. He produced an edition of the laws of William I, a Norman-French dictionary, translations of Britton and of Selden's Dissertatio ad Fletam, and Domesday Book Illustrated—perhaps the best of the older works on Domesday Book.[12] In 1776 the French writer David Houard produced a collection of some of the authorities upon, and books about, Anglo-Norman law, from the eleventh to the end of the thirteenth centuries.[13] In 1777, 1780, and 1781 James Ibbetson, a

[1] Vol. iv 117; vol. v 403.
[2] Ibid 402; for the first Antiquarian Society and its successor see below 408-409.
[3] Vol. vi 574-595. [4] Ibid 595-597. [5] Vol. v 403, 404.
[6] D.N.B. [7] Collected Papers iii 454.
[8] D.N.B.; Maitland, Collected Papers ii 28 n., iii 412, 454; Winfield, Chief Sources of English Legal History 45, 67, 320.
[9] See vol. ii 151-154. [10] D.N.B.; Winfield, op. cit. 16, 263, 265.
[11] Above 167.
[12] Gross, Sources and Literature of English History no. 1888.
[13] Traités sur les Coutumes Anglo-Normandes, qui ont été publiées en Angleterre depuis le onzième jusqu'au quatorzième siècle; avec des remarques sur les

member of Exeter College, Oxford, and a barrister of Lincoln's Inn,[1] published some short tracts upon folkland and bocland, the judicial customs of the Saxon and Norman age, and the national assemblies under the Saxon and Norman Governments. Though the author had studied his printed authorities, they are slight pieces of work. He was led away by the old-established superstition that the Saxon constitution was "the foundation of the liberty of Britain"; [2] and this caused him to make some wild statements as to Saxon and Norman institutions.

The greatest of this school of historians, who devoted themselves to the elucidation of the early sources of the history of English law, is Thomas Madox (1666-1727).[3]

Madox was a student of the Middle Temple, but he was never called to the bar. He was a clerk in the treasurer's remembrance office and in the augmentation office. This employment gave him access to the records of which he made so great a use. His abilities brought him to the notice of Lord Somers who encouraged his work. To Somers his *Formulare Anglicanum* was dedicated, and a long "prefatory epistle" addressed to him accompanied the great *History of the Exchequer*. In 1714 Madox succeeded Rymer as historiographer to the King—a post which he held till his death in 1727.

His first work—the *Formulare Anglicanum*,[4] was published in 1702. It is a collection of charters and other documents, based mainly on materials which he found in the archives of the court of augmentations, from the Norman Conquest to the end of Henry VIII's reign. The collection itself and the dissertation prefixed to it are a most valuable contribution to the early history of conveyancing. His second and greatest work—the *History of the Exchequer* [5]—was published in 1711. Ever

principaux points de l'Histoire et de la Jurisprudence Françoises antérieures aux Etablissements de Saint Louis; vol. i contains extracts from Domesday, the laws of Henry I and Glanvil; vol. ii contains authorities for Scots law; vol. iii contains Fleta; vol. iv contains Britton and the Mirror of Justices.

[1] Black Books of Lincoln's Inn, iv 237; Admissions i 469.

[2] This superstition was well established in the seventeenth century; it influenced Coke and Hale, and even to some extent, Blackstone, Holdsworth, the Historians of Anglo-American Law 35-36; vol. v 475, vol. vi 587; below 414.

[3] The best authority for Madox is Professor Hazeltine's Essay, L.Q.R. xxxii 268-289, 352-372.

[4] Formulare Anglicanum: or a Collection of Ancient Charters and Instruments of Divers Kinds, taken from the Originals, Placed under several Heads, and Deduced (in a Series according to the Order of Time) from the Norman Conquest to the End of the Reign of King Henry the VIII.

[5] The History and Antiquities of the Exchequer of the Kings of England, in two Periods. To wit, From the *Norman Conquest* to the end of the Reign of King *John*; and From the End of the Reign of King *John* to the End of the Reign of King *Edward* II. Taken from Records. Together with A Correct Copy of the Ancient Dialogue concerning the Exchequer, generally ascribed to *Gervasus Tilburiensis*; And A Dissertation concerning the most Ancient *Great* Roll of the Exchequer, commonly styled The Roll of *Quinto Regis Stephani*.

since its publication it has been of the first importance to legal historians. Finance then, as at all periods of our history, touched many sides of national life, and was intimately allied to many branches of law; and the machinery of taxation and account was then, as always, intimately allied to many of the institutions of law and government. The *Firma Burgi* [1] was the last of his works published in his lifetime. It is a book upon the cities, towns and boroughs of England taken from the records. It was published in 1722, and it reached a second edition in 1726. His *Baronia Anglica* was published in 1736, nine years after his death. It is "a history of land-honours and baronies, and of tenure in capite, verified by records." It forms part of his projected "Feudal History and Costumier of England," which he did not live to finish.[2] Besides this history, he had projected also a history of Parliament, and a book on the theory of corporations, which he did not live to write.[3]

The greatest of these books is his *History of the Exchequer*, as an appendix to which he published for the first time the Dialogus de Scaccario, and settled the question of its authorship. The History is, as he says, "an apparatus towards a History of the Ancient Law of England;" [4] and this statement correctly describes all his books. The *Formulare Anglicanum* is, as I have said, an invaluable apparatus towards the history of conveyancing, the other three books are an equally invaluable apparatus towards the history of central and local institutions, the history of feudalism, and the history of the writ-system; and they also give us information as to ecclesiastical law, the law merchant, and local customs.[5] The use which I have made of all these books in many different volumes of this History illustrates the great value of the apparatus which Madox has provided.

The reason why Madox's works have been and will continue to be invaluable to all legal and constitutional historians is to be found in the manner in which he laid their foundations, and built upon those foundations. He laid his foundations by making transcripts from the records of matters relevant to his subject. He then reviewed them, and plotted out the main headings. Then he wrote down the relevant authorities under each head, and from those authorities compiled his text.[6] He

[1] Firma Burgi, or an Historical Essay concerning the Cities, Towns and Boroughs of England. Taken from Records.

[2] Preface to the Firma Burgi § 3, cited L.Q.R. xxxii 272 n. 2.

[3] Baronia Anglica 125, cited L.Q.R. xxxii 272 n. 2; Firma Burgi 50, cited L.Q.R. xxxii 278 n. 4.

[4] "The present work may be deemed, not only a history of the Exchequer, but likewise an *apparatus* towards a History of the Ancient Law of England," History of the Exchequer, Prefatory Epistle iii.

[5] L.Q.R. xxxii 287-288.

[6] History of the Exchequer, Prefatory Epistle iv, cited L.Q.R. xxxii 356-357.

adopted this plan in order that the text might represent the authorities, and not "any private opinions preconceived in my own mind."[1] These transcripts, made chiefly from the public records, fill ninety-four volumes, and represent thirty years of labour. They were bequeathed by his widow to the British Museum, so that they might be available to future historians. But these records were only the foundations. Madox was no mere collector of materials. He used them to tell a connected story;[2] and he was able to do this because he had all the necessary qualifications of an accomplished historian—a competent knowledge of Anglo-Saxon and mediæval Latin and French, a competent knowledge of law, and a thorough knowledge of paleography and diplomatic.[3] Moreover he was well acquainted with the modern literature of his subject, and had some knowledge of foreign, especially Norman, institutions and law.[4] But, though he was well read in this modern literature, he was careful always to refer to original authorities, to records and manuscripts rather than to printed books; for he wished to make an original contribution to history, and not to repeat what had already appeared in print.[5]

Madox was careful to base his histories on the solid foundations of original authorities for two reasons. In the first place, he had a keen sense of the duty of an historian to represent facts faithfully and truly.[6] In the second place, he had an equally keen sense of the importance of the lessons which history truly told could teach the men of his own day. Like Hale,[7] he considered that it was

> of some consequence to know and consider the ancient law, to the end we may be better guided in judging, what things are proper to be received, and what to be rejected, when offers are made (if they chance to be so) at any important alterations therein. For when we discern what things are agreeable and what not, to the nature and genius of

[1] History of the Exchequer, Prefatory Epistle iv, cited L.Q.R. xxxii 356-357.

[2] Copies of records, he said, are not history, but only materials for it; "to copy and publish those, amounteth to little more than Manual Labour; and doth not come up to the character of an Historian. If a man desireth to profit others, and to improve historical knowledge, Let him collect as great a Treasure as he can of Records and Authenticks, Let him connect them and digest them into Historical Discourse, Let him explain, compare and illustrate them with Candour and Judgment, Let him use them for Proofs and testimonies to support what he writes," Firma Burgi, Pref. § ix.

[3] L.Q.R. xxxii 273.

[4] Ibid 352-353.

[5] "In every work of mine I have endeavoured, as far as it was practicable, to avoid printing anything that is already printed; and if I make use of any Notion or Quotation which hath been published by another Authour, I take as much care as I can to do right to such Authour by referring to his Book," Firma Burgi, Preface § x; cp. History of the Exchequer, Prefatory Epistle iv-v, cited L.Q.R. xxxii 288-289.

[6] Ibid 274.

[7] Considerations touching the Amendment or Alteration of Lawes, Hargrave, Law Tracts 253-289, cited vol. vi 592-593.

the law, and the constitutional polity of this realm; we shall be (if I am not mistaken) the better able to see and take care, that under colour of improving the fabric, we do not superstruct what will not well cement, or trench too deep, in the foundation.[1]

For both these reasons he regarded the function of the historian as having in it something of a sacerdotal character. "In truth," he said, "writing of history is in some sort a religious act. It imports solemnity and sacredness; and ought to be undertaken with purity and rectitude of mind." [2]

History written in this way and in this spirit, and by an historian so well equipped, was particularly useful and necessary to lawyers. The common law was, as he said, founded on the ancient usages and customs of the realm, so that it was particularly important to know what those usages and customs originally were.[3] And, even if particular parts of these usages and customs had been abolished by statute, it did not follow that all the old law relating to them was useless. Thus:

Tenures in capite and by knights service are now taken away, and villainage gone into disuse. But men do not (I think) therefore conclude, that what occurs in records or books relating thereto, and particularly in Littleton, and Sir Edward Coke's Commentary upon him, is altogether useless. Those things, notwithstanding, are thought worthy of being read and known; as they show what the ancient law in those cases was; as they furnish men with arguments in cases where parity of reason may be urged; and as they serve to give men a clearer notion of the affections and suppositions of the Common Law. . . . And I think one may say in general (and I hope without offence) that for want of a due inspection and use of the ancient records and memoirs of this kingdom, many crude and precarious things have been advanced concerning our old laws and constitution: men having attempted, as it seems, to prove hypotheses concerning the ancient state of things, from either modern or present appearances.[4]

This reasoning is as true now as when it was written.[5] Indeed, if it were not true, legal history would have merely an antiquarian interest. And Madox shows what Maitland and others have proved in our day, that history thus written can correct even the books of authority. He is able to correct Littleton's statements as to the English boroughs [6] and as to escuage;[7] and, commenting upon Coke's statement that early deeds were undated, in order that it might be alleged that they were made within the time of prescription so as to make them pleadable,[8]

[1] Formulare Anglicanum, Preface, second § viii.
[2] History of the Exchequer, Prefatory Epistle iii.
[3] Formulare Anglicanum, Preface, second § viii. [4] Ibid.
[5] A good illustration of its truth is the use made by Hargrave of the mediæval law of villeinage in his argument in Sommersett's Case (1771) 20 S.T. 1 to prove that the status of slavery was not recognized by English law, vol. iii 508; below 410.
[6] Firma Burgi 2. [7] Baronia Anglia 215-227.
[8] Co. Litt. 6*a*, cited vol. iii 230 n. 11.

he says: "whether that were the true reason may, perhaps, be doubted. It may be before Bracton's time, they were not so well skill'd in questions of law as this amounts to."[1] And it should be noted that, in applying this historical criticism to the sources of our law, Madox was carrying on a work begun by Selden, which our modern school of historical lawyers rightly regards as one of its most important functions.[2]

It is not surprising that Madox's books have stood the test of time better than any other eighteenth-century book, except Gibbon's *Decline and Fall of the Roman Empire.* How well they have stood that test is proved by the testimony of such historians as Stubbs and Maitland, Round and Vinogradoff; and by such modern authorities on the Exchequer as Poole, and the editors of the latest edition of the Dialogue which Madox first published.[3] As Professor Hazeltine has said, his qualities of mind and workmanship have made his work classical.[4]

The work of all these men shows that, all through the eighteenth century, the study of the early history of law and legal institutions was actively pursued. The fact that this study excited a very active interest in historians and lawyers is illustrated, first by the foundation of the second Antiquarian Society, and, secondly, by the publication, at the expense of the government, of two very important works, which have been of great use to historians of many different sides of English life.

We have seen that, at the end of the sixteenth century, many of the distinguished lawyers and historians, who had revived successfully the studies of law and history, had, with the help and encouragement of Archbishop Parker, formed an Antiquarian Society, which met at Sir Robert Cotton's house.[5] It came to an end at the beginning of James I's reign; and James I prevented its revival, probably because he saw in some of its members, and in the researches which they were prosecuting into the history of the law, the most formidable enemies to his scheme of prerogative government. That it was an active society can be seen from the collection of papers read by its members, which Thomas Hearne published in 1720 under the title of "Curious Discourses."[6] In 1717 a new Antiquarian Society was founded which consisted of a number of persons who had been meeting

[1] Formulare Anglicanum xxx § xxv.

[2] L.Q.R. xxxii 355-356; for Selden's editions of the older law books see vol. v 409, 411.

[3] For these appreciations of Madox see L.Q.R. xxxii 370-371.

[4] Ibid 371-372.

[5] Vol. v 402; Cambridge History of English Literature ix 357-358; Hearne, Curious Discourses, Introduction. Some account is given of the members of the first Society in the 1777 edition of the Curious Discourses, vol. ii 421-449.

[6] In the edition of 1777 the Discourses omitted by Hearne are published; the topics are for the most part connected with political and legal institutions.

since 1707 to discuss historical questions. Madox was elected a member of this body in 1708.[1] In 1770 the Society began to print selections from its papers under the title of *Archæologia*.[2]

The two important works which were published at the expense of the government were Rymer's[3] *Fœdera* and the *Rolls of Parliament*. The publication of a collection of treaties was due to Lord Somers. Rymer, the editor (1641-1713), had been a dramatist, a literary critic, and a poet before he had turned to antiquarian studies. His tract on the "Antiquity, Power and Decay of Parliaments," which was published in 1684, showed that he had definitely turned to the study of constitutional history; and in 1692 he was made historiographer to the King. Therefore, when the publication of this collection of treaties was undertaken by the government in 1693, Rymer was the obvious person to be appointed editor. In its compilation he took as his model Leibnitz's *Codex Juris Gentium Diplomaticus*. In spite of difficulties in getting reimbursed for the large sums which he spent on the work, he printed fifteen volumes between 1704 and 1713; and five more volumes were printed after his death in 1713 by his co-editor Sanderson. The documents contained in these volumes range from 1601 to 1654. The work was received with enthusiasm both at home and abroad. A second edition of the first seventeen volumes was issued between 1727 and 1730; and a third edition in ten volumes, which contained new documents, was issued between 1735 and 1745. Though the work was originally designed to be a collection of treaties, it is more than that. Since it "contains a vast amount of matter of interest to the lawyer as well as to the diplomatist, besides matter which has nothing to do with either," it has been called "the Bible of antiquaries."[4] The edition of the *Rolls of Parliament*, which, as we have seen, was taken in hand by order of the House of Lords in 1767, is of greater importance to the legal and constitutional historian. We have seen that this work, though defective if measured by modern standards of historical scholarship, has done good service to the study of legal and constitutional history.[5]

The historians, whose works have just been described, were not purely legal historians; and some of them were not professional lawyers. The number of works devoted to legal history, or to some branch of legal history, which were written

[1] L.Q.R. xxxii 270 and n. 2.
[2] Cambridge History of English Literature ix 358.
[3] For Rymer see the article in the D.N.B.
[4] Winfield, Chief Sources of English Legal History 122-123.
[5] Vol. ii 423; for an account of the editors of this edition and the quality of their work see Richardson and Sayles, Rotuli Parliamentorum Hactenus Inediti (C.S. 3rd series) li, xxiii-xxv.

by professional lawyers, is less in quantity and somewhat inferior in quality.

Some of the most important contributions to legal history were made by Francis Hargrave [1] (1741 ?-1824), treasurer of Lincoln's Inn in 1813 [2] and recorder of Liverpool in 1797. His mind gave way in 1813; and very fortunately the House of Commons was persuaded to purchase his library for £8000, and so preserve it for the nation.[3] He was a great historical lawyer and a great collector of materials for legal history. He made his name by his argument in *Sommersett's Case* [4] in 1771. As I have pointed out in an earlier volume,[5] that argument persuaded Lord Mansfield to disregard the view, for which there was considerable authority, that, by the custom of the merchants, English law would recognize the status of slavery and the right of property in a slave, and to give a decision to the contrary effect, which was based on the mediæval law as to villeinage.[6] We have seen that his mastery of the mediæval law is also shown in his edition of Coke upon Littleton, which was completed by Charles Butler.[7] His mastery of seventeenth-century public law is shown by the cases which he selected for his edition of the State Trials and the notes which he appended to them.[8] He was Thurlow's most efficient "devil"; [9] and his arguments [10] show that he was as accomplished a modern lawyer as he was learned in the history of the law.

The British Museum catalogue of the MSS. in his library shows that he had amassed a wonderful collection of documents which illustrate all periods in the history of the law. That collection comprises *inter alia* law reports, readings, law treatises, many of Hale's MSS., documents relating to Parliament, the City of London and many different courts, opinions and arguments of eminent lawyers, commonplace books. His principal service to legal history is his publication in his *Law Tracts* and the *Collectanea Juridica* of some of the unpublished Tracts in this collection. Among the documents published in the former book are Hale's Treatise *De Jure Maris*, *De Portibus Maris*,

[1] D.N.B. [2] Black Books of Lincoln's Inn iv 130.

[3] Some other MSS. were purchased by Lincoln's Inn from his son in 1843 for £50, Black Books iv 222.

[4] 20 S.T. 1. [5] Vol. iii 508.

[6] Wynne in the first of his Law Tracts at pp. 27-30 (below 421-422) tells us that a case before Lord Mansfield in 1763 was compromised by the claimant's assent to the manumission of the slave; and that Lord Mansfield had directed manumissions in previous cases.

[7] Above 372. [8] Above 128. [9] Above 323.

[10] He published two volumes of Juridical Arguments in 1797-1799, and three volumes of Jurisconsult Exercitations in 1811-1813; the latter work was intended to include his arguments and essays and was expected to extend to six or more volumes.

and concerning the Customs.[1] Among the documents published in the latter work is Hudson's treatise on the court of Star Chamber.[2] Equally valuable is his edition of Hale's treatise on the House of Lords, which is accompanied by a long and learned historical introduction.[3] Though his style is verbose it is never obscure. His arguments in the important cases in which he was retained, and his introductions to some of the original authorities which he published, contain excellent and accurate learning. But though in those arguments and introductions he contributed much of his own, I think that his greatest services to legal history were his publication of excellent editions of unpublished material; and his greatest service both to legal doctrine and to legal history was his scholarly edition of, and notes to, Coke upon Littleton.

In addition to Hargrave's work, there are one or two books devoted to the history of a particular branch of law. One of the best of them is Gilbert's *History of the Exchequer*, which there is reason to think was intended to be part of a general history of the courts.[4] Like Gilbert's other books, it was not finally revised, and it was published posthumously in 1758. It is an able and clearly written book in seventeen short chapters by one who was a master both of the present practice which, as Chief Baron, he administered, and of the older authorities. It gives a clear historical account of the various sources of the revenue, of the processes of its collection, and of the manner in which the accounts of it were taken.

The history of procedure is represented by R. Boote's *Historical Treatise of An Action or Suit at Law*, which was published in 1766. It is an able summary, of which I have made use in a preceding volume of this History. One of the objects of the book was to lay a foundation for some very necessary reforms in this branch of the law,[5] the need for which was clearly explained by the author.[6] Another book, which is not without merit, is an anonymous essay on the office of the Lord High Steward, published in 1776. The author had studied the French literature on the office of Steward, and

[1] For this treatise see vol. vi 588.

[2] For this treatise see vol. v 164-166. [3] See vol. vi 587-588.

[4] See the Preface to the History; for Gilbert C.B. see above 140; for his works see above 352 n.; for the connection of these works with Bacon's Abridgment see above 169-170.

[5] "The following *Historical Treatise of a Suit at Law* is intended not only to illustrate and explain such formal Parts of our Writs and Pleadings, but to point out such Parts of them as, having no other Foundation but in ancient Use and Customs, it is apprehended, may be very well spared, and the remaining Part of the Pleadings thereby not only rendered more clear, significant, and intelligible, but at the same time less grievous to the Client," Pref. p. iv.

[6] Ibid vi-xiv, 26-29, 91-92, 107-110.

the relevant English authorities.[1] But it is now superseded by Vernon Harcourt's authoritative study which was published in 1907.[2]

We have seen that many of the books on public law,[3] on criminal law [4], and the land law [5] deal historically with various aspects of the law, because it was not possible to deal with the law except by means of an historical approach. We shall see that the continuity of English law had established an historical tradition in the legal profession ; [6] and that, for this and other reasons, Blackstone's Commentaries, which is the only book which deals with English law as a whole, gives us the best history of English law from Edward I's reign down to the period when he wrote.[7] But it was not till 1783 that a lawyer set out to write a book upon the history of English law as a whole. John Reeves published the first volume of his *History of English Law* to the end of Edward I's reign, in 1783; the second, to the end of Henry VII's reign, in 1784; and a second edition, with a continuation to the reign of Philip and Mary, in 1787. A third edition was published in 1814, and a further continuation to the end of Elizabeth's reign in 1829. A new edition, edited by Finlason, was published in 1869.

Reeves [8] was born in 1752 or 1753. He was educated at Eton and Oxford, and became a fellow of Queen's College. From 1791-1792 he acted as chief justice of Newfoundland. Afterwards he held various official appointments, and was made King's printer in 1800. He was a classical scholar, had some knowledge of Hebrew, and was a fellow of the Royal Society and of the Society of Antiquaries. He died in 1829. He was a strong Tory, and founded an association "for preserving liberty and property against levellers and republicans." The violence of his political opinions led to the most remarkable episode in his career—his prosecution, by order of the House of Commons, for publishing a pamphlet, in which he magnified the power of the King and maintained that Parliament and juries were mere adjuncts of the constitution. The attorney-general, Sir John Scott, prosecuted. It was a libel of a very opposite kind to those which he was usually employed to prosecute at that time; and he must have agreed with a good deal in the pamphlet. In

[1] The Office of Lord High Steward of England; or an Historical Dissertation on the Origin, Antiquity, and Functions of that Officer: with Remarks on the ancient and modern modes of trying Peers; and an Epitome of some remarkable Tryals in the reign of Richard II. To which is added, a Catalogue of the High Stewards of England, from the Conquest to the present time, with the names, crimes, and sentences of the Peers whom they tried.

[2] His Grace the Steward and Trial by Peers. [3] Above 337, 339-343, 346.
[4] Above 361-362. [5] Above 367-375. [6] Below 415-417.
[7] Below 725. [8] D.N.B.

fact, he did not press the case very hard against the accused who was acquitted.[1]

Reeves wrote many books and pamphlets, some of which I have already noticed.[2] At this point we are concerned only with his *History of English Law*.

Reeves's history was, if we except Hale's incomplete sketch of the history of the common law,[3] the first general history of English law which had ever been written. It was inspired, so the author tells us, by the closing chapter of Blackstone's Commentaries—he wished, he said, " to fill up with some minuteness the outline there drawn." [4] The book is not without merits. The author gives a careful account of the history of procedure and pleading. As Maitland says:[5]

> He had studied the Year Books patiently, and his exposition of such part of our legal history as lies in them is intelligent and trustworthy; it is greatly to his credit that, writing in a very dark age (when the study of records in manuscript had ceased and the publication of records had not yet begun), he had the courage to combat some venerable or at least inveterate fables.

Thus, he was sceptical as to the authority of the Mirror of Justices;[6] and he alludes to the point, recently taken by Bolland, that the words of the statute *De Donis Conditionalibus* are not wholly consonant with the interpretation which the courts have put upon it.[7] But it must be confessed that the defects of the book outweigh the merits. First, the book is indescribably dull —indeed its dullness has probably injured the cause of legal history as much as the literary style of Blackstone and Maitland has helped it forward. Secondly, it is written from purely legal sources. It is true that Reeves had not at his disposal anything like the material which we have to-day.[8]

[1] (1796) 26 S.T. 530; the jury said that the pamphlet was an " improper publication," but that as there was no seditious intent they returned a verdict of not guilty; it was said that this censure was occasioned by one obstinate juryman who refused to acquit unless the jury would insert it; the other eleven were in favour of an immediate acquittal, ibid. at pp. 594-595; Reeves followed this pamphlet up by others which he published anonymously in 1799 and 1800.

[2] Above 350, 391.

[3] Vol. vi 585-586.

[4] Preface to the first edition.

[5] Collected Papers ii 6.

[6] Reeves, H.E.L. (ed. 1869) ii 232-238.

[7] Ibid 200; cp. vol. iii 114-116.

[8] " He had not the *Placitorum Abbreviatio*, nor Palgrave's *Rotuli Curiae Regis;* he had no Parliament Rolls, Pipe, Patent, Close, Fine, Charter, Hundred Rolls, no Proceedings of the King's Council, no early Chancery Proceedings, not a cartulary, not a manorial extent, not a manorial roll; he had not Nichol's *Britton*, nor Pike's nor Horwood's Year Books, nor Stubbs' *Select Charters*, nor Bigelow's *Placita Anglo-Normanica;* he had no collection of Anglo-Saxon ' land books,' only a very faulty collection of Anglo-Saxon dooms, while the early history of law in Normandy was utter darkness. The easily accessible materials for that part of our history which lies before Edward I have been multiplied ten-fold, perhaps twenty-fold; even as to later periods our information has been very largely supplemented," Maitland, Collected Papers, ii 9.

Where Reeves was only able to state a naked rule, taken from Bracton or the Statute Book, and leave it looking bare and silly enough, we might clothe that rule with a score of illustrations which would show its real meaning and operation.[1]

But even if Reeves had had this additional material it is probable for the two following reasons that he would not have written an interesting book. Thirdly, Reeves has no sense of proportion—no idea that the " sterile part of antiquity " [2] ought to be avoided. He describes the most minute procedural technicalities at inordinate length. Fourthly, he makes no attempt to connect the history of the law with the political, social, and economic ideas of the age which he is describing—he makes no use of Domesday Book.[3] He differed from Blackstone on this matter,[4] and expressly denied that legal history could be written with reference to those ideas.[5] The only ideas which he discusses are the technical ideas of the common law, " which are left to look like so many arbitrary canons of a game of chance." [6] These technical ideas, coupled with bald narratives of events, summaries of statutes, and a slight account of the literature of the law at different periods, make up the book.

The book has suffered badly at the hands of Finlason, its latest editor. Finlason was a learned but muddle-headed lawyer with no historical sense. Reeves had passed somewhat lightly over the Saxon period, and was sceptical of the authority of the Mirror of Justices. Finlason had some very exaggerated ideas as to the continuance of the influence of Roman law from the time of the occupation of the Romans; and he believed that the Mirror of Justices gave a trustworthy account of the Saxon period. Reeves was rightly sceptical as to the Saxon origin of the jury: Finlason had no doubt that the Saxons had a complete system of trial by jury, and could see little difference between trial by jury and trial by compurgation. Unfortunately for Reeves, his book is usually read in Finlason's edition encumbered by Finlason's notes.

" Unreadable and unread," has been the description applied to Reeves's book. Uninteresting it is; but that it is not unreadable and has not been unread is plain from the fact that it has passed through several editions. But the time when the book appeared was not a time which was favourable to the historical study of the law. The best intellects of the day were

[1] Maitland, Collected Papers ii 9.

[2] This phrase was used by Selden in the Preface to his History of Tithes, vol. v 411.

[3] Maitland, Collected Papers ii 9.

[4] Above 98; below 725.

[5] " It has been apprehended that much light might be thrown on our statutes by the civil history of the times in which they were made; but it will be found on enquiry that those expectations are rarely satisfied," Preface to the first edition.

[6] Maitland, Collected Papers ii 6.

turning to Bentham and that rationalistic school of which I shall give some account in the next chapter. It was not till the revival of historical studies in the nineteenth and twentieth centuries that men's minds began to turn again to the historical study of the law. It is largely for this reason that Reeves's history was the only general history of English law till Pollock and Maitland's history was published in 1895, and the only history of English law after Edward I's reign until the publication of this History.

But though English lawyers have not troubled to write the history of their own law, it would be a mistake to suppose that the study of legal history has been wholly neglected. One of the effects of Coke's work was the preservation of the historic continuity of the common law,[1] and therefore the establishment of an historical tradition, which has made it necessary for all lawyers to know something of the history of the law, and has made some of our more learned lawyers no mean historians.[2] During the latter part of the seventeenth century the strength of this historical tradition made it difficult for James II to get twelve judges, and impossible for him to get twelve lawyers, to see eye to eye with him on questions of constitutional law;[3] and the improvement in the character of the bench, which followed the Revolution, strengthened it. If we look at any of the important books of the eighteenth century—at such books as Hawkins's *Pleas of the Crown*,[4] Burn's *Justices of the Peace*,[5] Fearne's *Contingent Remainders*,[6] or Butler's notes to Coke upon Littleton[7]—we can see that the lawyers who wrote them were well read in the history of the legal doctrines of English law; and we shall see that it was the strength of this historical tradition which defeated Lord Mansfield's attempts to reform from the bench established doctrines of the common law.[8] In the third quarter of the eighteenth century this tradition was broadened and enlightened by Blackstone's *Commentaries*. We shall see that the *Commentaries* are not only the best literary statement of the law of Blackstone's day, but also the best history of English law that had yet appeared.[9] They had a great influence, both in England and America, in maintaining the historical tradition;[10] and they began the process of eliminating many of those crude legends to which Coke's credulity had given currency.[11] When at the end of the eighteenth and the beginning of the nineteenth centuries, law reform, inspired

[1] Vol. v 490.

[2] For an account of this historical tradition which has been established in the legal profession see Holdsworth, the Historians of Anglo-American Law, 11-29.

[3] Vol. vi 509-510. [4] Above 361. [5] Above 332-334.

[6] Above 374-375. [7] Above 373. [8] Below 555-559.

[9] Below 725. [10] Below 726. [11] Below 725.

by Bentham's *a priori* reasonings from the principle of utility, began, this historical tradition, broadened and enlightened by Blackstone, was of the utmost service in preserving the continuity of English law. Though large parts of English law were reformed by lawyers who had learned in Bentham's school, these lawyers had absorbed the historical tradition. The reforming statutes were generally preceded by reports which contained careful historical statements of the law, reasons why reform was needed, and skilful suggestions as to how the new rules could, with least disturbance, be substituted for the old. Perhaps the best illustration of a reform carried out in this manner is the Fines and Recoveries Act.[1] All through the nineteenth century, and down to the present day, the effects of this historical tradition can be seen in the judgments of such lawyers as Willes, Blackburn, Cockburn, Lindley, Bowen, and Macnaghten.

No doubt, as Maitland has pointed out,[2] the maintenance of this historical tradition has had some bad effects on the study of legal history. In the first place, the lawyer necessarily looks at the law from the point of view of its bearing on the case before him. Therefore if it is necessary for him to have recourse to mediæval authorities, he reads them with the object, not of finding out what they meant for the lawyer of the Middle Ages, but of finding out what they have come to mean in the light of modern decisions. " It is possible," says Maitland,[3]

> to find in modern books comparisons between what Bracton says and what Coke says about the law as it stood before the statutes of Edward I, and the writer of course tells us that Coke's is " the better opinion." Now if we want to know the common law of our own day Coke's authority is higher than Bracton's, and Coke's own doctrines yield easily to modern decisions. But if we are really looking for the law of Henry III's reign, Bracton's lightest word is infinitely more valuable than all the tomes of Coke. A mixture of legal dogma and legal history is in general an unsatisfactory compound.

In the second place, this historical tradition has obscured the fact that it is sometimes necessary to institute a comparison between the development of law in England and its development in foreign countries, if we would understand the full significance of the English development. Take, for instance, the history of the jury. Why did it fade out in France and develop in England ?[4] The answer to that question gives us valuable lights upon many aspects of the history of the English system of procedure, civil and criminal. But lawyers educated only in their own historical tradition are apt to attend only to the develop-

[1] 3, 4 William IV c. 74. [2] Collected Papers i 490-491. [3] Ibid 491.
[4] Vol. i 315-316; another illustration is the light which the history of continental criminal procedure throws upon the procedure used by the court of Star Chamber, vol. v 170-196.

ments of English law as portrayed by English statutes and the decisions of English courts.

But, in spite of these bad effects, I think that the maintenance of the historical tradition has been on the whole beneficial to the study of legal history. In the first place, the sentence from Roger North, which I have placed on the title-page of this History, shows that it has driven into the minds of lawyers, who wish to be something more than mere practitioners, the fact that they must study legal history if they wish to attain that mastery of the law which comes of understanding. In the second place, the legal historian must, if his work is to be effective, know modern law. He must know the end of the story in order that he may detect and emphasise in the early authorities the ideas which have survived and have influenced the course of legal development.[1] A lawyer, for instance, who has this tradition is a better editor of Year Books than a lawyer or historian who is a mediævalist and nothing more. So that it can be maintained that the possession of this historical tradition has gone some way towards fitting English lawyers to be legal historians. In the third place, the fact that the English system of case law has compelled lawyers to go from precedent to precedent means that they are often obliged to discuss and distinguish cases from all periods of our legal history. The result is that the reports not only contain summaries of the history of a point at different periods, but also the authorities on which those summaries are based. These summaries, as I can testify from my own experience, are of the utmost value to the legal historian. It is true that they are made for a purpose—for the purpose of deciding the issue raised by the pleadings. It is true that they are sometimes based on false historical traditions. But it is equally true that they always give the historian a starting-point, which easily leads him to other authorities, and eventually to a conclusion as to the true course of historical development.

(x) *Students' Books on English Law, Roman Law, and Legal Theory.*

We have seen that, throughout the seventeenth century, it had been recognized by the writers of books for students that their legal education was not complete unless, in addition to English law, they learnt something about Roman law and legal theory.[2] This fact had been recognized not only by civil lawyers

[1] "A thorough training in modern law is almost indispensable for anyone who wishes to do good work on legal history. In whatever form the historian of law may give his results to the world . . . he will often have to work from the modern to the ancient, from the clear to the vague, from the known to the unknown," Maitland, Collected Papers i 493.

[2] Vol. v 16-24, 397-398; vol. vi 601-602.

such as Zouche [1] and Fulbecke,[2] but also by English lawyers such as Dodderidge,[3] Finch,[4] Philipps,[5] and Brydall.[6] It was also recognized by writers of students' books in this century; for we shall see that some of the authors of students' books on English law, e.g. Thomas Wood [7] and Wooddeson,[8] wrote also on Roman law and legal theory. We can therefore divide these books roughly into the three categories of books on English law, books on the Roman civil or canon law, and books on legal theory.

Books on English law. Lord Mansfield, on being consulted by a brother peer as to what book could be recommended to his son who was to study law, replied: "till of late I could never with any satisfaction to myself answer such a question; but since the publication of Mr. Blackstone's *Commentaries* I can never be at a loss." [9] Blackstone's *Commentaries* were primarily a text-book for students; but they were a great deal more than that; and I shall deal with them from this and other points of view at the end of this chapter.[10] There is no doubt that Mansfield was right both as to the merits of the *Commentaries* and as to the demerits of the text-books for students before Blackstone wrote. At the beginning of the eighteenth century, the absence of any first-rate book of Institutes was as marked a defect in legal literature as when Bacon wrote at the beginning of the seventeenth century.[11] Apart from such older books as Littleton, Coke, and the Doctor and Student, and one or two books of Maxims,[12] the only book was Finch's *Nomotechnia*. But, since this book was written in the earlier half of the seventeenth century, and since the outlook of the author is towards the past rather than towards the future, it had come to be in some parts obsolete, and in other parts inadequate.[13] It was to fill this gap in legal literature that Thomas Wood, who had already published books on Roman law and on legal theory, published in 1722, his *Institute of the Laws of England*.

Wood (1661-1722) [14] was a nephew of Anthony Wood and a connection of Holt, C.J., a fellow of New College, Oxford, and a barrister of Gray's Inn. He took the degrees of B.C.L., and D.C.L., and was a student, as his books show, of Roman law and

[1] Vol. v 17-20. [2] Ibid 22-24. [3] Ibid 397-398.
[4] Ibid 399-401. [5] Ibid vi 601. [6] Ibid 601-602.
[7] Below 419. [8] Below 420.
[9] Holliday, Life of Lord Mansfield 89-90.
[10] Below 711 seqq. [11] Vol. v 488 n. 4.
[12] Ibid 398-399, 488; for some account of the reception into English law of Latin maxims drawn from the title of the Digest *De Diversis Regulis Juris* see Hazeltine Introd. to Ogg's Edition of Selden's Dissertatio ad Fletam (Cambridge Studies in Legal History) xlii-xlvi.
[13] For this book see vol. v 399-401; Wood said that it was "the most methodical book extant that ever was wrote by one of our profession," Thoughts concerning the Study of the Laws of England in the two Universities 19.
[14] D.N.B.

jurisprudence as well as of English law. In later life he abandoned the legal profession, took orders, and became rector of Hardwick in Buckinghamshire.

Though Wood had considerable knowledge of Roman law, he recognized the fact that the study of English law was more important to the student.[1] He had studied it more thoroughly; and his *Institute of the Laws of England* was the most important and the most popular of his books. It was written, he tells us,[2] to supply the want of a methodical book on English law, which could be put into the hands of students in the Inns of Court and the Universities. Wood, by his advocacy of the view that the outlines of English law ought to be taught at the Universities,[3] anticipates Blackstone,[4] just as, in some respects, he anticipates him in the design and execution of his book.[5] In fact, as Blackstone recognized, the book had considerable merits. "Upon the whole," he said,[6] "his work is undoubtedly a valuable performance; and great are the obligations of the student to him, and his predecessor Finch, for their happy progress in reducing the elements of law from their former chaos to a regular methodical science." It had a very considerable success, for it reached a tenth edition in 1772. But it had its defects. Wood, as Blackstone says, contented himself with merely enlarging and modernizing Finch's book, so that the reader is "frequently in the dark with regard to the reason and original of many still subsisting laws which are founded in remote antiquity."[7] Moreover the book was not well proportioned. "As in some titles his plan is too contracted, in others also it seems to be too diffuse."[8] In other words, Wood lacked that literary tact which

[1] "Why must our own laws, the Common Law of England, be banished thence [i.e. from the Universities], and young Scholars in a manner debarred that Study? It is infinitely of more use amongst us, even than the Canon and Civil Laws; for it is twisted and interwoven almost into all manner of Discourse and Business, comprehending almost all that is valuable with us in those Laws," Thoughts concerning the Study of the Laws of England in the two Universities 6-7.

[2] "My Intention by this *Institute*, is not only to help the Students in the *Inns* of *Court* and *Chancery*, but moreover to recommend the Study of the *English* Laws, to our young *Nobility* and *Gentry*, and to the Youth in our *Universities* (not excepting those who are designed for the *Clergy*, but for many reasons earnestly inviting them to it) by supplying them with a *Method*, to help their memories; and to convince them that the Study of our Laws is now of less Difficulty, and of more Use in publick and private Business, than they are aware of," Preface iv.

[3] Thoughts concerning the Study of the Laws of England in the two Universities. His contention (p. 3) was that English law "ought to have a part in the education of an English Gentleman"; that the nobility, who thought themselves above the study of the common law with ordinary students in the Inns of Court, that others who could not afford the cost of an education at the Inns, and that those designed for the priesthood who by custom "were in a manner barr'd from those Societies," should have "a general and compendious knowledge of our laws and the reason of them"; above n. 1.

[4] Above 97-99.

[5] Below 711-712.

[6] Preface to Analysis of the Law.

[7] Ibid.

[8] Ibid.

Dicey rightly singled out as one of the outstanding merits of Blackstone's *Commentaries*.[1]

Wood's book was superseded by Blackstone's *Commentaries*, which begin a new era in students' text-books on English law. The two most remarkable of the text-books published after the *Commentaries* are Richard Wooddeson's Vinerian lectures, which were published in 1792 under the title of *A Systematical View of the Laws of England*,[2] and Edward Wynne's *Eunomus*.[3]

Richard Wooddeson [4] (1745-1823) was a demy and fellow of Magdalen College, Oxford, and a barrister and bencher of the Middle Temple. He was elected a Vinerian scholar in 1766 and Vinerian fellow in 1776. Between 1773 and 1776 he served as one of the deputies of the Vinerian professor, Robert Chambers, who had become a judge of the High Court of Calcutta; and, on the resignation of Chambers, he was elected Vinerian professor. His competitor, who nearly defeated him, was Giles Rooke of St. John's College, Oxford, who afterwards became a judge of the court of Common Pleas.[5] He held the professorship till 1793, and acted also as counsel for the University and as commissioner of bankrupts. It would seem from his book that he had some practice in the court of Chancery.[6] While he was professor, he published, in addition to his text-book on English law, a short book on jurisprudence.[7] He had planned a work on tithes; but failing health prevented him from writing it. He died in 1823.

His *Systematical View of the Laws of England* consists of the sixty lectures which he gave as Vinerian professor; and those sixty lectures occupy the sixty chapters of the three volumes of the work. They are divided into three "general divisions." The first, which consists of twenty lectures, deals with "the laws as referred to persons"; the second, which consists of fifteen lectures, deals with "the laws as referred to things or property"; the third, which consists of twenty-five lectures, deals with actions. Six of these lectures on actions deal with criminal prosecutions, thirteen with private civil actions, and six with suits in courts of equity. Wooddeson felt the difficulty of following

[1] Lecture on Blackstone's Commentaries, Camb. Law Journal iv 296-297.

[2] A Systematical View of the Laws of England; as treated in a course of Vinerian Lectures, read at Oxford, during a series of years, commencing in Michaelmas Term, 1777.

[3] Eunomus; or, Dialogues concerning the Law and Constitution of England. With an Essay on Dialogue.

[4] D.N.B.

[5] Wooddeson was only elected by a majority of five votes out of a poll of 457 voters, Foss, Judges viii 364.

[6] He printed as an appendix to his last volume three cases heard by the court of Chancery, in two of which he had been counsel; we shall see that he gives a fuller account of equitable doctrines than Blackstone, below 421.

[7] Below 428-429.

so eminent a professor as Blackstone, and of avoiding repeating what he had already said.[1] He wished, he said, to make his lectures so far as possible a supplement to the *Commentaries*.[2] He succeeded in his object.[3] The lectures give a clear and learned summary of the law; and they were no doubt of considerable service to students. But they lack the grasp of principle, the historical sense, and the literary deftness and tact, which made Blackstone's *Commentaries* a classical book. The fact that he left his book in the form of lectures shows that he had not spent the time and trouble in revision and rewriting that Blackstone spent.[4] In two respects, however, he gives fuller information than is given by Blackstone in his *Commentaries*. In the first place, he gives in his second part a whole lecture on the subject of captures by sea, because he knew of no book in which this body of doctrine had been "digested into any methodical order."[5] In the second place, we shall see that Blackstone's treatment of equity is not very satisfactory.[6] Wooddeson, who had had some practice in the court of Chancery,[7] gives, in his last six lectures, a useful summary of some of the rules as to proceedings in equity, injunctions, the specific performance and rescission of contracts, and the administration of assets.[8]

Edward Wynne[9] (1734-1784) was the eldest son of William Wynne, serjeant-at-law.[10] He was a member of Jesus College, Oxford, and a barrister of the Middle Temple. He inherited the estate of Little Chelsea, where the scene of the three Dialogues in his *Eunomus* is laid. Though he was a man of wealth and had no need to practice, he devoted himself to the study of the law. His works show that he was a sound lawyer, and a good legal historian with considerable literary gifts. His collection of law tracts, which he published in 1765,[11] give the result of his

[1] "The publication of those admired Commentaries . . . has assisted the labour of every student of the law; and I may add . . . that it has perhaps equally increased the difficulties attending the professor's office. . . . It is not easy for a successor . . . to enter more minutely into any legal subject, so as to be intelligible to a young auditor, without either repeating in a different method and expression, or else supposing him acquainted with the elementary learning therein contained," Wooddeson, Elements of Jurisprudence 109.

[2] Ibid 109-110.

[3] There was a second edition in 1839.

[4] Below 720-721.

[5] Wooddeson, Elements of Jurisprudence 112-113.

[6] Below 590-594.

[7] Above 420.

[8] Systematical View iii 365-539.

[9] D.N.B.

[10] Serjeant Wynne was Atterbury's counsel; he was accused of having used as his own the speech that his client was about to make in his defence, Horace Walpole, Catalogue of Royal and Noble Authors (ed. 1806) iv 137 n. 7, and Letters (ed. Toynbee) i xliv; he denied this charge and, as he points out, it is for many reasons inherently improbable, Wynne, Law Tracts 209-219.

[11] Their titles are: I Observations on Fitzherbert's Natura Brevium. II Enquiry concerning the reason of the Distinction the law has made in cases of theft between things annexed to the freehold, and things severed from it. III Argument

researches into legal history. They are clearly written and well expressed. The first is a sketch of the history of writs, showing what writs were obsolete, and what writs had taken their place. The second is an essay on the law as to things which were not the subject of larceny because they were annexed to the freehold. The third is an argument addressed to the visitor of All Souls College on the claim of founder's kin to election as fellows, which controverts Blackstone's views expressed in his essay on collateral consanguinity.[1] The last two essays are by Wynne's father—serjeant Wynne. The last essay on the status of the serjeants was occasioned by the attempt of Willes, C.J., in 1755, to abolish the monopoly of the serjeants in the court of Common Pleas, just as serjeant Manning's book in 1840 was occasioned by a similar attempt by Brougham. He also published in 1790 a little book of sketches of the characters of twenty eminent lawyers of his own day.[2] Though it is sometimes a little sententious, it is interesting, since it gives us the impression which these lawyers made upon a contemporary lawyer of considerable ability.

His most original and useful book is his *Eunomus*, which he published in 1774.[3] In that book he uses the machinery of a Dialogue, as Fortescue used it in the *De Laudibus*,[4] and as St. Germain used it in the *Doctor and Student*,[5] to explain and justify in clear and untechnical language some of the most salient characteristics of English law.[6]

The scene of the Dialogues is Wynne's home at Chelsea. The parties to the first two Dialogues are Eunomus who is Wynne, and Policrites. Policrites makes various criticisms upon the study of the law and upon some of the rules of English law, which Eunomus answers. The parties to the third Dialogue are the same, with the addition of a third—Philander—who has returned from a European tour. His account of his travels is made to lead up to a discussion of government in general and a description of the salient features of the British constitution.

in favour of collateral Consanguinity. IV Account of the Trial of the Pix. V Observations on the Court of Claims. VI Observations on the Catalogue of Royal and Noble Authors. VII Observations on the Antiquity and Dignity of the degree of Serjeant-at-law; the idea of making the collection, Wynne tells, originated from his preparation for the press of the last essay.

[1] Below 705, 709.

[2] Strictures on the Lives and Characters of the most eminent lawyers of the present day, including that of the Lord Chancellor and the twelve Judges; the lawyers described are Thurlow, Mansfield, Camden, Bathurst, Pepper Arden, Kenyon, Buller, Grose, Ashurst, Loughborough, Gould, Heath, Wilson, Eyre, Hotham, Perryn, Thompson, Macdonald, John Scott, Anstruther.

[3] There were later editions in 1785, 1791, 1809, 1821, 1822.

[4] Vol. ii 569-570. [5] Vol. v 266-269.

[6] Wynne, in the Essay on Dialogue, prefixed to the Eunomus i lvii-lxvi, gives some account of the writers on English law who had made use of the method of Dialogue.

The range covered by these Dialogues is wide. In the first Dialogue the liberal character of the study of law is vindicated. It is, Eunomus explains, a school of oratory and statesmanship; and it demands a study of English history, of the law of nature, and the civil and the canon laws. In the second Dialogue Eunomus defends the technical language used by lawyers, and explains why the three languages of Latin, French, and English were for a long period the languages of the law; why the rules of pleading had some claims to be called a science; why the law insists on formalities in pleading and in conveyancing; why the law struggled against perpetuities; the origin of uses and trusts and their effects upon conveyancing; the reasons for absolute freedom of testation; the principles underlying the complications of the law of procedure, civil and criminal; the reasons for exclusion of the evidence of the parties to an action; the reason for the law's delays and for its expense; the history of the legal profession and legal education. The third Dialogue is concerned mainly with an explanation of the origin of government, and the salient features of the British constitution. Much of it, the author admits, had been anticipated by the publication of Blackstone's *Commentaries*.[1] He explains the differences between common law, statute law, and particular customs; the mode of enacting and publishing statutes; the distinction between public and private Acts; the rules for construing statutes; legal sanctions; the authority of case law; the history of the reports; the history of trial by jury, and the relation of the court to the jury; punishment; the denial of counsel to prisoners accused of felony; the origin of the courts of law and equity; the reason for the distinction between law and equity; the circuit system; the form of colonial governments; the position of aliens; the as yet nascent rules as to the conflict of laws. Since all these various matters are explained clearly and in untechnical language, the book must have been very valuable to a student. It is true that Eunomus is, far more than Blackstone, an unqualified apologist for all the anomalies of English law private and public. Thus he defends the indiscriminate application of the death penalty, and seems to think that the fact that the Crown has a power to pardon answers all criticisms;[2] and he defends the anomalies of the representative system. But it must be remembered that he is

[1] "If any body can have an objection to this work [the Commentaries], it must be myself; for I find myself partly in the position of Dr. Middleton, who was told 'his book had been answered twenty years before it was published.' Mine has laid by till it ceases in a great measure, to be what it was intended to have been. The third dialogue, as to some material parts of it, has been anticipated," Essay on Dialogue, Eunomus i lxxxvi.

[2] Vol. xi 562-565.

answering an objector who puts the other side of the case; and it cannot be doubted that the skill with which these various topics are treated make it a very stimulating introduction to the study of English law.

Some of the older types of student's books are represented in the eighteenth century. The books of legal maxims are represented by *The Grounds and Rudiments of Law and Equity*, which had come to be so bulky that it had ceased to be useful as a book for students.[1] Books which set out to teach students the elements of the law of procedure and pleading are represented by William Bohun's *Institutio Legalis*,[2] which describes in detail the practice of the courts of King's Bench and Common Pleas, the nature of the actions brought in those courts, and the principal rules of pleading. It gives minute instructions as to the steps to be taken in an action, and as to the making up of the record. It even includes information as to the contractions usually used in writing Latin words. In the rules as to the bringing of various actions a few of the main rules of substantive law are given, and once a little piece of history.[3] The main rules of pleading are set out as bare rules. No attempt is made to explain the reason underlaying them.

Books which are merely short cram books are illustrated by Giles Jacob's *Law Grammar*,[4] which deals in seven short chapters with the definition and division of laws; maxims and general rules for the interpretation of laws; public and private individuals; offences and punishments; estates real and personal; the conveyance and descent of land, and intestate succession to personal property; the courts of law and equity and actions and suits therein; words of art and legal terms in general use. At the end is appended a list of abbreviations used in legal references. That students found it a useful book is shown by the fact that it reached an eighth edition in 1840. Gilbert Horsman's *Notes on the Fundamental Laws of England* (1753)[5] is a book of a similar character. It explains the main divisions of English law, the differences between the statute law and the common law, and the position taken in England by the civil

[1] Above 189.

[2] Institutio Legalis: or, an Introduction to the Study and Practice of the Laws of England. It was first published in 1708, and reached a third edition in 1724; it is divided into four Parts—I the practice of the court of Queen's Bench; II the practice of the court of Common Pleas; III the nature of all actions usually brought in either of the said courts; IV the order and method of pleading; throughout precedents are given.

[3] At pp. 156-157 as to the writ of Quo Warranto.

[4] A Law Grammar, or Rudiments of the Law. In the Preface to the first edition (1744) the teaching of the elements of English law at schools and the Universities is advocated; for Jacob's other works see above 176, 334, 340, 381, 384.

[5] Notes and Observations on the Fundamental Laws of England; with some account of their origin and present establishment.

and common law. The historical part is in substance an abstract of Hale's *History of the Common law*.[1] Two more considerable books for students by Giles Jacob are *The Student's Companion* (1725) [2] and *A Treatise of Law* (1721).[3] The first of these books summarizes under alphabetical heads, beginning with "Actions" and ending with "Writ," a few leading facts as to important legal topics. It contains a short introduction giving advice to the student as to his plan of study and the books he should read. The author says that as it was his favourite work "it hath cost me unusual labour." [4] It had some success, since it reached a third edition in 1743. The second of these books aims at giving a general introduction to the common, civil, and canon laws. It pursues for the most part the alphabetical method. The first part, which deals with the common law, consists of 128 maxims alphabetically arranged with short notes. It is followed by a short description of criminal and civil procedure and of courts of justice, and a slight account of the law of property. The civil law is dealt with under 117 alphabetical heads, beginning with "Accession" and ending with "Wrecks," and is followed by some account of the differences between the civil and the common law under 31 alphabetical heads. The canon law is dealt with under 41 alphabetical heads. Though the alphabet is a convenient scheme of arrangement for a practitioners' book,[5] it is wholly unsuited for a student's book. Such a mode of presenting the law obviously leads to unintelligent cramming.

A curious little book entitled *Deinology* (1789) [6] was written to explain to English barristers the principles of logic and rhetoric. The oratory of the English bar is, the author says, "wild and vicious." The last part of the book gives some good advice as to the examination and cross-examination of witnesses.

Books on the Roman civil or canon law. Some of the students' books on English law explain that English lawyers ought to acquire some knowledge of the Roman civil and canon laws—for instance Giles Jacob in the book which I have just described,[7] and Wynne in his *Eunomus*,[8] made this point. Before they wrote, Thomas Wood had attempted to supply the needs of students who wished to acquire this knowledge. In 1704 he published

[1] For this book see vol. vi 585-587.

[2] The Student's Companion: or, Reason of the Law; containing Readings on the Common and Statute Laws of this Realm.

[3] A Treatise of Laws; or, a general Introduction to the Common, Civil, and Canon Law.

[4] Preface to the second edition.

[5] Above 173-175.

[6] Deinology: or, Union of Reason and Elegance: being Instructions to a young Barrister. With a Postscript, suggesting some considerations on the *viva voce* examination of Witnesses at the English Bar. By Hortensius.

[7] Above nn. 2 and 3.

[8] Eunomus i 77-85.

his *New Institute of the Imperial or Civil Law*.[1] It is not only a book on the Roman civil law adapted to the needs of students of English law, but also an essay in comparative law; for it contains notes "shewing in some principal cases, amongst other observations, how the canon law, the laws of England, and the laws and customs of other nations differ from it." In the preface, after giving a short account of the way in which the laws of different European countries had been influenced by Roman law, he goes on to show that though "we reject the Civil and Canon law when it contradicts the *Jus Coronae, the Common Law*, or our *Acts* of Parliament," yet, some of the customs which make up the common law are borrowed from the civil and canon laws; and statutes "are oftentimes drawn upon a Platform borrow'd from both those Laws to regulate inconvenient Usages or other Defects." Both these laws have, as he said, served "as auxiliaries" to English law. The canon law was in part applied in the ecclesiastical courts, the civil law in the court of the Constable and Marshall and the court of Admiralty, and "our Chancery has borrowed the very Method of Trial from the Civil law." Some of our older writers owe much to those laws—"Fleta and Bracton would look very naked if every Roman lawyer should pluck away his feathers." For these reasons, he concludes, the Roman civil law is necessary for the proper understanding of the common law. And it is even more necessary for the understanding of the laws of other nations and international law. He points out that it is not good for the reputation of Englishmen abroad to be wholly ignorant of foreign law; and that this ignorance did not conduce to the success of our negotiations with foreign princes.[2]

We have seen that Wood recognized the superior importance of English law, and that he on that account advocated its study at the universities.[3] This book shows that he also recognized the importance of the study of the civil law, and, by means of this study, of the acquisition of some knowledge of comparative law. It shows considerable learning in the civil law, the canon law, the common law, and the laws of many European countries; and it draws attention to the salient differences in the law of

[1] A New Institute of the Imperial or Civil Law. With Notes, showing in some Principal Cases amongst other Observations, how the *Canon* Law, the Laws of *England*, and the Laws and Customs of other *Nations* differ from it.

[2] "If we do not understand the *Terms* which are frequently made use of in the affairs of other nations, they will be apt to despise us; for our character often rises and sinks in the judgment of the common people according to the figure which those persons make which we send amongst them. And as Princes are not exempt from the prejudices which attend on humane nature, so the reputation of wisdom and knowledge (which sometimes follows our Embassadors) does often insensibly prevail, when a formal repetition of their instructions concurr'd very little to the success," Preface.

[3] Above 419.

England and foreign law. Since the Roman civil law is taken as the basis of comparison, the book is arranged on the plan adopted by writers on that law. After an introduction, which deals with such generalities as justice, the law of nature and nations, the civil law, custom, and equity, it is divided into four books. The first book deals with persons; the second with things or rights; the third with obligations contractual and delictual and crimes;[1] the fourth with procedure, civil and criminal. Under each of these heads the law is clearly stated, and the relevant authorities are given. But, as in his *Institute of the Laws of England*,[2] there is too little discussion of principles and too much attention to the statement of detailed rules. That it was a useful book can be seen from the fact that it reached a fourth edition in 1730. But it cannot be said to make the subjects of which it treats interesting; for the author, though a learned and industrious man, had no spark of genius, and a very pedestrian style. It is, however, creditable to Wood that he should have been the only person to make a serious attempt to render it possible for a student to accomplish what many before and after him recognized as desirable—the liberalizing of his studies by the acquisition of some knowledge of Roman law and comparative law.

Books on legal theory. In 1705, the year after he had published his book on Roman law, Wood translated certain sections of Domat's great book—*Les Lois Civiles dans leur Ordre Naturel*.[3] He translated the first twelve chapters of Domat's introduction, and the first title of his preliminary book. He entitled his work *A Treatise of the First Principles of Laws in General*.[4] He intended it, he says on his title-page, to be an introduction to his book on Roman law, and it is prefixed to the later editions of that book. Though the chapters translated may have been useful to a French lawyer who was embarking on the study of Domat's book, they cannot have been very useful to an English student, who was embarking on the study of Wood's book. Their approach to the subject is very unfamiliar to a student of English law, for it is entirely theological and ethical. Law and society are made to depend upon two primary laws. The

[1] The third book is said to be "Of Actions"; but this was a mere following of the older civilians, such as Azo who dealt with obligations and actions together, see vol. ii 274-275.

[2] Above 419-420.

[3] Brissaud, Histoire du droit Français i 395-396; the book was translated in 1722 by William Strahan, LL.D., King's Advocate, with "additional remarks on some material differences between the Civil Law and the Law of England"; Strahan makes no mention of the fact that Wood had translated some sections of the book.

[4] A Treatise of the first Principles of Laws in General, of their Nature and Design, and of the interpretation of them. Translated out of the French. Being a proper Introduction to the New Institute of the Imperial or Civil Law with Notes etc. Wood does not tell us what the French author was whom he translated.

first of these laws commands men, who have been created in the image of God, to seek the sovereign good; and the second "obliges them to union and mutual love." In the first six chapters the consequences of these two primary laws are worked out.[1] After dealing shortly with the place of "Successions" in the social order,[2] and the three things—litigation, crimes, and war—which disturb it,[3] there is a chapter on "the state of society after the fall of man and how God makes it to subsist." This introduces a discussion of government, the authority given by God to the higher powers, and the place of religion in the state. Then follows a chapter on "religion and policy and the administration of spiritual and temporal powers." The last three chapters, which deal with the different kinds of laws, rules as to the use and interpretation of laws, and rules of law in general, are more practical; but, since the point of view is that of a civilian, it cannot have been of much assistance to a student of English law, who wished to acquire some elementary knowledge of Roman law, and used the book, as Wood intended, as an introduction to his study of that subject.[4] In fact Strahan's translation of Domat[5] is a very much more considerable book, both as a book on Roman law, and, by reason of the translator's notes, as a book on comparative law.

A very much more useful book for students was Wooddeson's *Elements of Jurisprudence*.[6] The book consists of six lectures, which were given as a course introductory to the author's Vinerian lectures on English law. The first lecture deals with the current theories of the law of nature, and the relation of divine and moral law to legal rules. The second lecture deals with the "civil positive or instituted law." In it there are discussions of the origin of society and civil government, the right of an individual to change his state, the reason for the existence of rules of positive law, the subject matter of those rules and the sphere of their operation, their sanctions, promulgation, interpretation, and their repeal or disuse. The third lecture deals

[1] These chapters are: I Of the first Principles of all Laws; II A Plan of Humane Society, as it is founded upon the two Primary Laws, by two sorts of Obligations; III Of the First Kind of Obligations; IV Of the Second Kind of Obligations; V Of some general Rules which arise from the Obligations mentioned in the preceding Chapter, and which are so many Fountains of the Civil Laws; VI Of the Nature of Friendships and their Use in Society.

[2] This chapter occupies about half a page.

[3] This chapter occupies about one page.

[4] The work does not appear to have been very extensively read in France; Brissaud, op. cit. i 396 says, "Domat, dit Portalis, est le premier qui institue des généralités. On a dit de son ouvrage que c'était la préface du Code civil, mais il faut ajouter que c'était une preface peu connue; on l'admirait de confiance; on ne le lisait guère."

[5] Above 427 n. 3; below 642.

[6] Elements of Jurisprudence treated of in the Preliminary Part of a Course of Lectures on the Laws of England.

with "the several species of magistracy." The distinction between the legislative, executive, and judicial power is emphasised, and the advantages of monarchy, aristocracy, and democracy are discussed. Then follows a somewhat inconclusive discussion as to the limits of the legislative power. The advantages of keeping the executive power distinct from the legislative are set out, and something is said of the functions of the judiciary. The fourth lecture deals with the law of nations. International is distinguished from municipal law, and an able summary is given of the sources of international law, and of some of its rules. The fifth lecture contains a short sketch of the sources of English law, and the influence of the civil and canon law on English law; the distinction between the common law and the enacted law; and the reports and books of authority. The sixth lecture deals with the study of the law and the legal profession. The course ends with an account of the objects aimed at by the professor in his Vinerian lectures, and the manner in which he proposed to arrange his subject matter. Some parts of these lectures are perhaps a little slight; but they are clearly written, and give the law student of that period a good introduction to his studies in English law.

I have said of the legal literature of the second half of the seventeenth century that, with the two exceptions of Hale and Dugdale, it was considerable in quantity but very ordinary in quality.[1] The legal literature of the eighteenth century is more considerable in quantity, and its quality is distinctly higher. No doubt many, perhaps most, of the books of which I have given some account, are purely utilitarian books written for practitioners. But even these books show, in many cases, an improvement in style, in arrangement, and in mastery of legal principles. Some of these books attain a high standard of learning. Instances are Wright's Tenures, Booth's Real Actions, Powell's books on Contracts and Mortgages, Kyd's books on Awards, Corporations, and Bills of Exchange, and the books written by Chief Baron Gilbert. A few have some literary qualities. One or two books may be said to rank as legal classics. Into this class I should put such books as Hargrave and Butler's edition of Coke, Fearne's Contingent Remainders, Burn's Justices, and perhaps Jones's book on Bailments. Some of the books on the borderline of law and history, such as Madox's works and the works of Hickes and Wilkins, have taken rank as authoritative works which are indispensable both to lawyers and to legal and constitutional historians.

One reason for this improvement in legal literature was the

[1] Vol. vi 574.

fact that many of the lawyers were becoming more literate. I think that this fact emerges in many of the books of the period; and it is confirmed by the very varied selection of books which the Inns of Court were purchasing for their libraries. The lists of books which were purchased for the library of the Inner Temple show that there was a demand for books on many aspects of English history, mediæval and modern,[1] for collections of authorities for English history,[2] for books on Greek and Roman literature and antiquities,[3] for books on the canon and civil law,[4] for books on Scotch law,[5] and for books on international law.[6] The catalogue of Lincoln's Inn library tells the same tale. These catalogues show that the proportion of books purchased on history and classical and modern literature, to purely law books, was higher in the eighteenth century than is possible at the present day, because the output of law books has, like the output of books on all other subjects, very largely increased; so that considerations of cost and space prevent so many purchases of books on general history, literature, and classical antiquities.

Another reason for this improvement was the fact that many practitioners found it necessary to know something of bodies of law which were outside the sphere of the common law. We have seen that it might be necessary for the equity practitioner to know something of the rules of ecclesiastical law;[7] and we shall see that it was necessary for the common law practitioner to know something about foreign systems of commercial and maritime law.[8] It was necessary for practitioners before the Privy Council to know something of the bodies of law which the colonial Legislatures and courts were creating; and, in the case of appeals from India, something of Hindu and Mohammedan law. It was necessary for the law officers of the Crown,[9] and sometimes for the judges and the common law and equity practitioners,[10] to know something about the latest developments in international law. Thus the learning, not only of great

[1] Among the books purchased were Strype's Annals of the Reformation, and Hemingi Cartularium Ecclesiae Wigorniensis, Inner Temple Records iv 129; Gulielmus Neubrigensis, and Annales Trivetti, ibid iv 183; Parker's Antiquities of the British Church, ibid iv 230; Liber Niger Scaccarii, and Walter de Hemingford, ibid iv 262; Collier's Ecclesiastical History, ibid iv 403; Fuller's Ecclesiastical History, ibid iv 437; Raleigh's History of the World, ibid iv 480; Cart's History, and Fiddes' Life of Cardinal Wolsey, ibid iv 536, 564; Horsley's Britannia Romana, ibid iv 564.

[2] E.g. Wilkins' Concilia, ibid iv 358, and Thurloe's State Papers, ibid iv 464.

[3] E.g. Catrou and Roville's Roman History, ibid iv 230, 358; Imperatorum Romanorum Numismata, ibid iv 279; Augustini Gemmae et Sculpturae Depictae, ibid iv 464; Junius de Pictura Veterum, ibid iv 480; Life and Writings of Homer, ibid iv 536.

[4] E.g. the twenty-eight volumes of the Tractatus Tractatuum, ibid iv 208.

[5] E.g. Craig's Jus Feudale, ibid iv 279.

[6] E.g. Corps Universel Diplomatique du Droit des Gens, ibid iv 183.

[7] Above 225. [8] Below 454, 467, 525-526. [9] Below 469, 637.

[10] Below 510, 638.

judges like Hardwicke and Mansfield, but also of many other judges and leading practitioners, was broader and more liberal than the learning of the leading lawyers of the latter part of the seventeenth century. This fact is, I think, clear from the reports of this century. One good illustration is the large amount of learning drawn from legal and other sources ancient and modern, foreign and English, which was applied in the case of *Omychund v. Barker* [1] to determine the question whether the evidence of a Hindu witness, given under the sanctions prescribed by his religion, was admissible in an English court. The fact that the lawyers of the day were able to appreciate a first-rate piece of work when they saw it is shown by the immediate acceptance of Blackstone's *Commentaries* as a classic; [2] and that they were able to criticize and appraise the qualities of the legal literature of their own and earlier centuries is shown by the writings of such men as Hargrave and Butler.

But we must now turn from the consideration of the tools which the lawyers made and used in the exercise of their profession, to a consideration of the manner in which these tools were employed by some of the leading lawyers to apply and develop the law.

The Chief Justices and other Lawyers, 1700-1756

The list of the Chief Justices of the courts of King's Bench and Common Pleas, and of the Chief Barons of the Exchequer, during this period, will be found at the foot of this page.[3] With the careers of those of them who became Chancellors, I have already dealt; and I have said something of some of the others in their capacity of reporters or authors. At this point I propose, in the first place, to say something of the Chief Justices of the two Benches, the Chief Barons, and some of the other notable lawyers; and, in the second place, to say a few words

[1] (1744) 1 Atk. 21.

[2] Below 716.

[3]

King's Bench	*Common Pleas*	*Exchequer*
John Holt 1689-1710, see vol. vi 516-522.	Thomas Trevor 1701-1714.	Edward Ward 1695-1714.
Thomas Parker 1710-1718.	Peter King 1714-1725.	Samuel Dodd 1714-1716.
John Pratt 1718-1725.	Robert Eyre 1725-1736.	Thomas Bury 1716-1722.
Robert Raymond 1725-1733.	Thomas Reeve 1736.	James Montague 1722-1723.
Lord Hardwicke 1733-1737.	John Willes 1737-1760.	Robert Eyre 1723-1725.
William Lee 1737-1754.		Jeffrey Gilbert 1725-1726.
Dudley Ryder 1754-1756.		Thomas Pengelly 1726-1730.
		James Reynolds 1730-1738.
		John Comyns 1738-1740.
		Edward Probyn 1740-1742.
		Thomas Parker 1742-1772.

as to the characteristics of the development of the common law during this period.

Of the first of the Chief Justices of the King's Bench—Thomas Parker, who afterwards became Lord Chancellor Macclesfield—I have already spoken.[1] We have seen that his decisions show that he was an able common lawyer, and that his decisions on the law of constructive treason, contracts in restraint of trade, and employer's liability, helped to ascertain and develop the law.[2] Of Lord Hardwicke's short career as Chief Justice I have also said something.[3] We have seen that he was considered by his contemporaries and immediate successors to have shown himself as great a common lawyer as he was an equity lawyer.[4] His most elaborate decision, in which he proved that he was as learned in the ecclesiastical law as in the common law, was, as we have seen, the case of *Middleton v. Crofts*.[5] Some of his other decisions on such topics as the rules which should govern the grant of new trials ;[6] as to the conditions upon which a member of Parliament who had been arrested could get his discharge since the statute of 1700 ;[7] on questions of commercial[8] and maritime[9] law ; on liability on contracts illegal by foreign law, but legal by English law ;[10] on contracts in restraint of trade ;[11] on points connected with the law of real property[12]—show that he would have made a great name as a Chief Justice if he had not been called away so quickly to the court of Chancery. Of the other Chief Justices of the King's Bench, and of their contributions to the development of law, I must now give some account.

John Pratt[13] (1657-1725) was a scholar and fellow of Wadham College, Oxford, and was called to the bar by the Inner Temple, February 12, 1682. After the Revolution[14] he soon acquired a large practice at the bar. He appeared for the Crown before the House of Lords in Fenwick's case in 1696, and before

[1] Above 204-210. [2] Above 207-208. [3] Above 242-243.
[4] Above 242. [5] (1737) Cas. t. Hard. 57, 326 ; above 242.
[6] The King v. Poole (1734) ibid 23.
[7] Holiday v. Pitt (1734) ibid 36 ; 12, 13 William III c. 3 ; vol. iv 257 ; vol. x 546.
[8] Lumley v. Palmer (1735) Cas. t. Hard. 74—parol acceptance of bill of exchange.
[9] Boucher v. Lawson (1734) ibid 85—liability of the owner of a ship for non-delivery of goods.
[10] Boucher v. Lawson (1735) ibid 194.
[11] Clerke v. Comer (1733) ibid 53.
[12] E.g. Dubber v. Trollop (1735) ibid 160.
[13] Foss, Judges viii 57-60 ; Campbell, Chief Justices ii 181-189 ; H. S. Eeles, Life of Camden, chaps. i and ii ; D.N.B.
[14] It is said that, having offended Jeffreys in a case in which he was appearing, he thought it wise to retire to Exeter till after the Revolution, Eeles, op. cit. 4-5. He retired to Exeter because the family was a Devonshire family, and his uncle Bernard Pratt was in practice as a lawyer in Devonshire, ibid 1-3.

the House of Commons for the new East India Company in 1698; and he became a serjeant-at-law in 1700. He was much in request as a Parliamentary counsel. Speaker Onslow said that he was one of the ablest advocates of the day. It was no doubt for that reason that he was asked in 1710 to act as one of the counsel for Sacheverell; but, being a consistent Whig, he refused. In 1711 he became a member of the House of Commons. He was a silent member; but was faithful to the Whig party; and, on the accession of George I, Cowper advised the King to make him a judge. He became a judge of the court of King's Bench on November 22, 1714. In 1718 he gave an opinion in favour of the King's claim to have the custody of his grandchildren;[1] and in the same year, when Parker became Lord Chancellor, he succeeded him as Chief Justice of the King's Bench.

Pratt's fame as a judge has been overshadowed by that of his more famous son—Charles Pratt afterwards Lord Camden.[2] But there is no doubt that he was an able lawyer, and a strong, dignified, and impartial judge. The respect which was inspired by his stern features and sonorous voice was enhanced by his amazing memory, which enabled him to sum up correctly all the points of a complicated case without a note. Though he has been criticized because he put a strict construction on the ruling of Holt, C.J., in the case of *R. v. Cranburne*, that prisoners during their trial ought not to be fettered,[3] and refused to allow Layer's fetters to be removed on his arraignment and before his trial, on the ground that he had attempted to escape,[4] there is no doubt that he conducted the trial fairly. His conduct in the litigation between Bentley, the Master of Trinity, and Cambridge University,[5] and in a case arising out of that litigation,[6] shows that he knew how to vindicate the power of his court to redress failures of justice in inferior courts, and that no political pressure could deter him from punishing criticisms upon its proceedings which amounted to a contempt.

Dr. Bentley had been deprived of his degree by the Vice-Chancellor and Congregation of the University, without having

[1] Vol. x 446. [2] Ibid 672, 675, 681, 690; above 304-310.

[3] (1696) 13 S.T. 222; vol. vi 518 n. 8.

[4] (1722) 16 S.T. 96-101; Pratt C.J. said at pp. 100-101, "the case of Cranburne, you will find that authority is when the party was called upon to plead and was tried at the same time. No doubt when he comes upon his trial, the authority is that he is not to be *in vinculis* during his trial. . . . Here he is only called upon to plead by advice of his counsel; he is not to be tried now; when he comes to be tried, if he makes that complaint, the Court will take care he shall be in a condition proper to make his defence."

[5] The King v. Chancellor, Masters and Scholars of the University of Cambridge (1723) 2 Ld. Raym. 1334; S.C. 1 Stra. 557.

[6] Below 434.

been heard in his defence. On the ground that the punishment of a person, without giving him an opportunity to defend himself, was a failure of natural justice,[1] the court of King's Bench issued a writ of mandamus ordering the University to restore him to his degree. Pratt, C.J., said : [2]

> It is the glory and happiness of our excellent constitution that to prevent any injustice no man is to be concluded by the first judgment ; but that if he apprehends himself to be aggrieved, he has another court to which he can resort for relief ; for this purpose the law furnishes him with appeals, with writs of error and false judgment. . . . The university ought not to think it any diminution of their honour, that their proceedings are examinable in a Superior Court. I am sure this Court, which is superior to the university, thinks it none.

He did not defend Dr. Bentley's behaviour :

> As to Dr. Bentley's behaviour upon being served with the process, I must say it was very indecent, and I can tell him if he had said as much of our process we would have laid him by the heels for it. . . . When he said the vice-chancellor *stulte egit* it was what he might have been bound over for to his good behaviour ; but I believe it is also established, that such behaviour will not warrant a suspension or deprivation. . . . But be these matters how they will, yet surely he could never be deprived without notice.

After the decision in this case, Dr. Colbatch, one of Bentley's opponents, had said in his book entitled *Jus Academicum* that "those who intend to subvert the laws and liberties of any nation commonly begin with the privileges and immunities of the Universities." Bentley applied for an attachment against Colbatch, on the ground that these words were a contempt of court ; and, in spite of the representations of Walpole and Lord Macclesfield, Pratt fined Colbatch £50, and bound him over to be of good behaviour for twelve months.[3]

Most of the lives of Pratt give prominence to one of his decisions on the law as to the settlement of a female pauper who had married a foreigner—a decision which was not followed in a later case—because that decision was summed up in some doggerel verses.[4] The result is to convey a misleading impression as to Pratt's abilities, and the importance of some of his decisions. Campbell, for instance, considers that his chief title to fame is that he was "a great sessions lawyer." [5] A brief glance at some of his decisions will show that he was much

[1] "The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence," *per* Fortescue J., 1 Stra. at p. 567.

[2] Ibid at pp. 564-565.

[3] Campbell, Chief Justices ii 184 ; Eeles, op. cit. 17-18.

[4] Foss, Judges viii 59 ; Campbell, Chief Justices ii 183 ; Eeles, op. cit. 19-20.

[5] Chief Justices ii 182.

more than this, and that he left his mark on many different branches of the common law.

Two of Pratt's decisions in the sphere of tort have become leading cases. We have seen that his decision in the case of *Bushel v. Miller* [1] was a clear authority for the proposition that a trespass which amounts to an asportation, is not necessarily a conversion; and that this decision has been important in correcting the tendency to confuse the spheres of the actions of trespass and trover, and in differentiating between the torts of trespass and conversion.[2] We have seen also that his decision in the case of *Armory v. Delamirie* [3] emphasized the rule that a possessor has all the rights of ownership except as against a person who can show a better right to possession, and that therefore he can bring trover against a person who infringes his rights.[4] The case of *Amies v. Stevens* [5] is a useful authority on the question when damage can be said to have been caused by an "act of God," so that a common carrier is not liable for it. It was held in that case that when a sudden gust of wind coming through a bridge sank the carrier's boat, the carrier was not liable.[6]

The most important of Pratt's decisions in the law of contract is the case of *Cumber v. Wane*.[7] The actual decision that the gift of a promissory note for £5 was not a consideration for a promise to discharge a debt of £15, has been over-ruled; [8] and whether or not the principle stated by Pratt that, since payment of a lesser sum was no satisfaction of a debt for a greater sum, a contract to pay a lesser sum is no satisfaction of an obligation to pay a greater sum,[9] is correct, is not yet finally settled. What is settled is the rule, which is older than *Cumber v. Wane*, that the payment of a lesser sum is not a valid consideration for the promise to discharge the debt.[10] In the case of *Loyd v. Lee* [11]

[1] (1719) 1 Stra. 128. [2] Vol. vii 416-421. [3] (1721) 1 Stra. 505.
[4] Vol. vii 426, 449-450. [5] (1718) 1 Stra. 127.
[6] "For though the defendant ought not to have ventured to shoot the bridge if the general bent of the weather had been tempestuous; yet this being only a sudden gust of wind, had entirely differed the case," ibid at p. 128.
[7] Ibid 426.
[8] Sibree v. Tripp (1846) 15 M. and W. 23; Goddard v. O'Brien (1882) 9 Q.B.D. 37.
[9] "If £5 be (as is admitted) no satisfaction for £15, why is a simple contract to pay £5 a satisfaction for another simple contract of three times the value," 1 Stra. at p. 427.
[10] Foakes v. Beer (1884) 9 A.C. 605—a case in which the payment of the lesser sum had been made, ibid at p. 606; Lord Selborne at p. 612 said, "it may well be that distinctions, which in later cases have been held sufficient to exclude the application of that doctrine were disregarded in *Cumber v. Wane;* and yet that the doctrine itself may be law, rightly recognised in *Cumber v. Wane*, and not really contradicted by any later authorities. And this appears to me to be the true state of the case"; for the history of this rule see vol. viii 21-22, 40, 84-85.
[11] (1717) 1 Stra. 94.

he held that if a married woman gave a promissory note, and, after her husband's death, promised to pay it in consideration of a forbearance to sue immediately, the contract was void, because forbearance to sue on a void, as distinct from a merely voidable, contract is no consideration. This is obviously sound law; but we have seen that the principle was obscured by the attempts of Lord Mansfield and his followers to equate consideration with moral obligation.[1] The case of *Towers v. Osborne*,[2] in which it was held that agreements to sell goods were not within § 17 of the Statute of Frauds, was the starting-point of a controversy on this question,[3] which was at length settled in 1828 by Lord Tenterden's Act which enacted that such agreements were within the statute.[4] The case of *Robinson v. Green* [5] recognizes the fact, which was sometimes forgotten,[6] that since assumpsit might be brought on a tort as well as on a contract, either "not guilty" or "non assumpsit" could be pleaded to the action.

Several of Pratt's decisions on points of commercial law are important. In the case of *Jenney v. Herle* [7] he held that a direction to pay money out of a particular fund could be a bill of exchange; and in the case of *Bomley v. Frazier* [8] that, in the case of a foreign bill of exchange, an indorser can be sued although no demand has been made on the drawer. The case of *Atkin v. Barwick*,[9] in which it was held that a delivery by A, who afterwards became bankrupt, to B to the use of C, vests the property at once in C, was upheld, but gave rise to much comment and explanation in later cases.

Equally important are several of Pratt's decisions on criminal cases. In *R. v. Kinnersley and Moore* [10] it was held that a combination to do an illegal act, though the act was not actually done, was indictable as a conspiracy; and that one of the conspirators could be indicted and convicted, although the others were not identified. The case of *R. v. Lister* [11] marks a stage in the development of the law as to the husband's control over his wife. In the Middle Ages the coercive powers which the law allowed to the husband were considerable.[12] In this case it was said that though it was lawful for a husband to imprison his wife if she "will make an undue use of her liberty, either by squandering away the husband's estate or going into lewd company," he had no right as a rule to imprison his wife—more

[1] Vol. viii 31-32.
[2] (1721) 1 Stra. 506.
[3] Cooper v. Elston (1796) 7 T.R. 14; Leake, Contracts (1st ed.) 258 n. (*a*).
[4] 9 George IV c. 14 § 7.
[5] (1723) 1 Stra. 574.
[6] Vol. iii 448-450.
[7] (1723) 2 Ld. Raym. 1361.
[8] (1720) 1 Stra. 441.
[9] (1719) 1 Stra. 165.
[10] (1718) 1 Stra. 193.
[11] (1721) 1 Stra. 478.
[12] Vol. ii 519 n. 1.

especially in a case like the present where there had been an agreement to separate. The case thus marks a considerable step towards the modern law as set forth in 1891 in the case of *R. v. Jackson*.[1] In *R. v. Plympton* [2] it was held that it was a criminal offence to promise money to a person to induce him to give his vote at an election. The haziness of the line between criminal and non-criminal cases is illustrated by the case of *R. v. Bennett*,[3] which was an information in the nature of a *quo warranto*. In that case, after long and learned arguments, all the judges were equally divided on the question whether, since the proceedings were in form criminal, there could be a new trial after verdict for the defendant.[4] It was not till later that the question was settled in the affirmative on the ground that the proceedings, though in form criminal, were in substance civil.[5]

Pratt's successor was Robert Raymond (1673-1733),[6] the son of Thomas Raymond,[7] who had been a judge in all the three courts of common law in Charles II's reign. Thomas Raymond entered his son Robert as a student at Gray's Inn when he was only nine years old. Robert was called to the bar on November 12, 1697, and soon acquired a good practice. He appeared for the Crown in 1702 in the case of *R. v. Hathaway*;[8] and his argument on behalf of Lindsay, charged with treason under a statute of 1698, showed that he was a very able lawyer.[9] Like his father he was a Tory; and, when the Tories came in in 1710, he was made solicitor-general. He was removed from office in 1714. But he made his peace with the government, and was appointed attorney-general in 1720, and, in that capacity, conducted the prosecution of Christopher Layer.[10] In 1724 he was made a judge of the King's Bench, and in 1725 he succeeded Pratt as Chief Justice. He was raised to the peerage—then an unusual honour for a Chief Justice [11]—by George II in 1731. He died in 1733.

Raymond is known chiefly from his reports, of which I have already given some account.[12] The earliest reports in his book come from the year 1694; so that, if these reports were taken

[1] [1891] 1 Q.B. 671.
[2] (1724) 2 Ld. Raym. 1377.
[3] (1717) 1 Stra. 101.
[4] See vol. i 216.
[5] R. v. Francis (1788) 2 T.R. 484.
[6] Foss, Judges viii 155-158; Campbell, Chief Justices ii 189-212; D.N.B.
[7] Vol. vi 559-560.
[8] 14 S.T. 639; Hathaway was indicted as a cheat and impostor for pretending to be bewitched by one Sarah Morduck, and his conviction, as Campbell says, Chief Justices ii 191, "opened the eyes of the public to the frauds and follies of witchcraft."
[9] (1704) 14 S.T. 987 at pp. 1007-1015.
[10] (1722) 16 S.T. 94.
[11] Jeffreys and Parker were the only preceding Chief Justices who had been made peers, Campbell, Chief Justices, ii 197 n.
[12] Vol. vi 560.

by himself,[1] he began to report cases while he was a student. He continued to make reports till the year before his death; but, in the latter part of his life, his reports are less full. As Lord Campbell says,[2] "he does by no means the same justice to himself which he had done to Lord Holt." There are very few cases in which he gives us his own judgments at length. But from his own reports, and also from the reports of Strange, we can see that he deserved the esteem in which he was held by his contemporaries.

It is in the sphere of the criminal law that he gave the most important of his decisions. His elaborate judgment in *R. v. Oneby* [3]—one of the small number of his own decisions as Chief Justice which he reported at length—went a long way to settle the question whether, when homicide had resulted from a fight between two persons, the offence was murder or manslaughter. In this case Gower and Major Oneby had quarrelled. They had both drawn their swords; but were prevented from fighting there and then, and had sat down to play. Gower offered to pass the matter over, but Oneby refused; and, after the company had left the room, he called Gower back. They fought and Gower was killed. All this was found by a special verdict which took two years to draw up; after two arguments, first before four judges, and then before all twelve judges, Oneby was found guilty of murder. His act was not the result of a sudden passion. He had had time to reflect, so that his act in killing Gower was deliberate, and therefore murder.[4] Some other important cases of homicide arose out of the disclosures made to a committee of the House of Commons as to the cruelties practised by the warden and gaolers of the Fleet prison on the prisoners in their custody.[5] A special verdict had found that Barnes, a gaoler employed by Huggins, who was warden of the prison, had confined one Arne in so unhealthy a room that he died.[6] Raymond, C.J., delivering the opinion of all the judges, held that though Barnes, who had fled the country, was guilty

[1] He tells us that there are cases taken by other persons in his reports, vol. vi 560 n. 3.

[2] Chief Justices ii 198.

[3] (1727) 2 Ld. Raym. 1485; S.C. 2 Stra, 766.

[4] "Though the law of England is so far peculiarly favourable (I use the word peculiarly, because I know no other law that makes such a distinction between murder and manslaughter) as to permit the excess of anger and passion . . . in some instances to extenuate the greatest of private injuries, as the taking away of a man's life is; yet in those cases it must be such a passion, as for the time being deprives him of his reasoning faculties; for if it appears reason has resumed its office . . . the law will no longer, under that pretext of passion, exempt him from the punishment, which . . . he justly deserves, so as to lessen it from murder to manslaughter," 2 Ld. Raym. at p. 1496; the King refused to grant a reprieve, and Oneby committed suicide the day before his execution.

[5] Vol. x 181-182; vol. xi 567-568.

[6] R. v. Huggins (1730) 2 Ld. Raym. 1574.

of murder,[1] Huggins, who was before the court, was not. He had not personally directed or aided or abetted or consented to the duress of the prisoner, which had caused his death; and, though he might be civilly liable for the acts of his deputy, he was not criminally liable: [2]

> It has been settled, that though a sheriff must answer for the offences of his gaoler civilly . . . yet he is not to answer criminally for the offences of his under-officer. He is only criminally punishable who immediately does the act, or permits it to be done.[3]

In the appeal of murder which was brought by the widow of Castell against Bambridge, a former warden of the Fleet, and Corbett a gaoler, for the murder of her husband, by confining him in a room where he was exposed to the infection of small-pox,[4] Raymond, C.J., gave a lucid direction to the jury as to the circumstances in which they might be held to be guilty of murder, if their treatment of their prisoners caused the death of those prisoners; [5] and on the facts in this case he directed an acquittal, which the jury obeyed.

We have seen that in the case of *R. v. Francklin* [6] he laid down the law as to the provinces of the judge and jury on an indictment for libel, in the same way as Lord Mansfield; [7] that in the case of *R. v. Curl* [8] he vindicated the claim made by the court of King's Bench in *R. v. Sedley* [9] to be the *custos morum*, and, differing from Holt, C.J.,[10] held that the publication of an obscene libel was indictable; [11] and that in *R. v. Woolston*,[12] he held that Christianity was part of the law and was protected by it. In the case of *R. v. Ward* [13] he held that the forgery of a writing by which a person might be prejudiced, and therefore the forgery of a receipt, was punishable as a forgery at common law—a somewhat questionable proposition historically; [14] and in the case of *R. v. Crooke* [15] he decided that, to support an indictment for forgery under the Act of Elizabeth,[16] the intent to defraud or molest was sufficient, though no one was in fact defrauded or molested. In *R. v. Cornwall* [17] he and all the judges

[1] At p. 1579. [2] At pp. 1580-1584. [3] At p. 1580.

[4] (1730) 2 Stra. 854; Bambridge had been indicted and acquitted (1729) 17 S.T. 310; the widow thereupon brought an appeal of murder against Bambridge and Corbett (1730) 17 S.T. 398; S.C. 2 Stra. 854; for the appeal of murder see vol. ii 362-364.

[5] 17 S.T. at pp. 452-462. [6] (1731) 17 S.T. 626; vol. viii 344.

[7] Vol. x 678. [8] (1727) 2 Stra. 788; vol. viii 337.

[9] (1663) 1 Sid. 168; vol. viii 407. [10] R. v. Read (1708) Fort. 98.

[11] 2 Stra. at p. 790; Fortescue J. dissented on the authority of R. v. Read.

[12] (1729) FitzGibbon at p. 65; vol. viii 408.

[13] (1724) 2 Ld. Raym. 1461; S.C. 2 Stra. 747.

[14] Vol. iv 501-502; it was the Star Chamber which first punished forgery in general, and here, as in other cases, the King's Bench took over its jurisdiction.

[15] (1731) 2 Stra. 901. [16] 5 Elizabeth c. 14. [17] (1731) 2 Stra. 881.

held that if a servant lets in a person who steals the goods, and then lets him out, both the servant and the thief are guilty of burglary. The case of *R. v. Bryan* [1] illustrates the need for the creation in 1757 [2] of the offence of obtaining goods and money by false pretences.

Some of Raymond's decisions upon the law of contract, quasi-contract and tort are important. In the case of *Osborn v. Governors of Guy's Hospital* [3] motive was distinguished from consideration. It was held that a man who did work for another, not in expectation of being paid, but in expectation of a legacy, could not sue on a *quantum meruit.* We have seen that his decision in *Hayes v. Warren* [4] helped to confuse the distinction between past and executed consideration. In the case of *Chesman v. Nainby* [5] the principle that the question whether a restraint of trade is reasonable and therefore valid, is a question of law for the court, was assumed ; [6] and his decision that the restraint in this case was valid was affirmed by the House of Lords.[7] In the case *Morris v. Martin* [8] he held that a husband is not liable for necessaries supplied to a wife who had eloped. In the case of *Southerton v. Whitlock* [9] he held that, if an infant ratifies his contract after attaining his majority, he is liable ; and in the case of *Holt v. Clarencieux* [10] that, though an infant could not be sued on his voidable contracts, he could sue upon them ; so that an infant could sue for breach of promise of marriage. The case of *Astley v. Reynolds* [11] shows that the law of quasi-contract was being developed by means of the action of assumpsit. It was held that money extorted by duress could be recovered in such an action ; and that it could be recovered even though the money was paid in pursuance of a usurious and therefore illegal contract, because the laws against usury were made for the protection of lenders.[12] In the case of *Reynolds v. Clarke* [13] Raymond gave a lucid exposition of the distinction between the spheres of the actions of trespass and case ; and in the case of *Chambers v. Robinson* [14] he held that an action for malicious prosecution lay though the indictment was faulty ; and that the

[1] (1730) 2 Stra. 866.
[2] 30 George II c. 24.
[3] (1726) 2 Stra. 728.
[4] (1732) 2 Stra. 933 ; vol. viii 16.
[5] (1726) 2 Ld. Raym. 1456 ; S.C. 2 Stra. 739.
[6] 2 Ld. Raym. at p. 1459 ; this principle was reaffirmed by the court of Appeal in the case of Dowden v. Pook [1904] 1 K.B. 45.
[7] 2 Ld. Raym. at p. 1459.
[8] (1725) 2 Stra. 647.
[9] Ibid 690.
[10] (1733) 2 Stra. 937.
[11] (1732) 2 Stra. 915 ; the principle there laid down was approved in the case of Green v. Duckett (1883) 11 Q.B.D. 275.
[12] This modification of the maxim *in pari delicto potior est conditio defendentis* was given a more extensive application by equity, and, as so extended, was introduced into the common law by Lord Mansfield, below 548-549.
[13] (1724) 2 Ld. Raym. at pp. 1402-1403.
[14] (1725) 2 Stra. 691.

fact that the defendant had advertised the prosecution was evidence of malice.

Raymond's decisions on points of commercial law are not very important. In the case of *Morris v. Lee* [1] he held that no precise words were needed to make a promissory note; and in the case of *Jenys v. Fawler* [2] that the acceptor of a bill cannot set up the forgery of the bill as a defence to an action by an indorsee for value. Some of his rulings on points of evidence are important. In the case of *R. v. Travers* [3] he refused to allow a child of seven to be called as a witness, because a child of that age could not "distinguish betwixt right and wrong"—a decision which was not followed in the case of *R. v. Brasier*,[4] which lays down the modern rule that a child is a competent witness if it understands the nature and obligation of an oath. In the case of *Pendrell v. Pendrell* [5] he laid down the modern rule as to the means by which it is possible to rebut the presumption that a child born during the subsistence of a marriage is legitimate. The case of *South Sea Co. v. Duncomb* [6] is a decision on the law of personal property. In that case he followed a decision of Holt, C.J.,[7] and held that a pledgee who has lent money to the pledgor, has, in addition to his security, a personal right of action against the pledgor for the debt, unless there is an agreement to the contrary. Raymond also decided a considerable number of cases which turned upon the construction of devises involving a consideration of the rule in *Shelley's Case* [8] and other points in the law of real property.[9]

There are several of his decisions which illustrate the nature of the control exercised by the court of King's Bench over the ecclesiastical courts. One or two illustrations, taken from the jurisdiction of these courts over grants of probate and administration and over executors and administrators, indicate the attitude of common lawyers to this jurisdiction. The court of King's Bench was careful to see that these courts kept strictly within their jurisdiction. Thus it denied that the ecclesiastical courts had jurisdiction to try the question whether a testator had given a defendant a *donatio mortis causa*—that was a question, it said, which could be tried in an action of trover; [10] and it denied that it could entertain a suit by the next-of-kin for the residue where an executor had been appointed—that was a question, it was said, which could only be tried by the court

[1] (1725) 2 Ld. Raym. 1396.
[2] (1733) 2 Stra. 946.
[3] (1725) 2 Stra. 700.
[4] (1779) 1 Leach 199.
[5] (1732) 2 Stra. 925.
[6] Ibid 919.
[7] Anon. (1701) 12 Mod. 564.
[8] Goodright v. Pullyn (1727) 2 Ld. Raym. 1437.
[9] E.g. Shaw v. Weigh (1727) 2 Stra. 798; Law v. Davis (1730) 2 Stra. 849.
[10] Thompson v. Hodgson (1727) 2 Stra. 777.

of Chancery.[1] On the other hand, it was ready to uphold their jurisdiction in a proper case. It refused to try an indictment for the forgery of a will till the question of the validity of the will had been finally determined by them ;[2] it refused to issue a mandamus to make a grant of administration *durante minore aetate* to a particular person ;[3] and it affirmed their power to grant administration *pendente lite*, and the right of such an administrator to bring actions.[4]

Raymond's successor was Lord Hardwicke.[5] When he became Chancellor he was succeeded by Sir William Lee (1686-1754).[6] Lee was called to the bar by the Middle Temple in 1711, and removed to the Inner Temple in 1717.[7] In 1718 he was made recorder of Wycombe, and in 1722 recorder of Buckingham. From 1718-1730 he held the post of the King's Latin secretary. In 1727 he was elected member for Wycombe and took silk in the following year. In 1729 he was counsel for Mrs. Castell in her unsuccessful appeal against Bambridge and Corbett.[8] In 1730 he was made a judge of the court of King's Bench ; and in 1737 he succeeded Hardwicke as Chief Justice, which post he held till his death in 1754. His brother Sir George Lee was at the same time Dean of the Arches and Judge of the Prerogative court of Canterbury ;[9] so that the brothers Lee present an interesting parallel to that greater pair of brothers, the brothers Scott, one of whom as Lord Stowell presided over the court of Admiralty, whilst the other as Lord Eldon was Lord Chancellor.

Lee was not a great lawyer ; but he was competent and learned. His note-books show that he was interested in history and philosophy as well as law, and that he had reflected on the legal historical and philosophical books which he had read.[10] They contain notes on points of legal history, some interesting anecdotes, comments on books, and odd pieces of information, e.g., as to the merits of the waters at Bath. Perhaps the most curious is the laconic entry of his second marriage—" I marryed to Mrs. M. M. May, 1733."[11] His commonplace book and his judicial note-books show great industry, but no originality.[12] But the praise given to him by Burrow shows that he was

[1] Hatton v. Hatton (1730) 2 Stra. 865.
[2] R. v. Rhodes (1725) 2 Stra. 703.
[3] Smith's Case (1731) 2 Stra. 892.
[4] Woolaston v. Walker (1732) 2 Stra. 918.
[5] Above 237 seqq.
[6] Foss, Judges viii 139-142 ; Campbell, Chief Justices ii 214-232—an unduly depreciatory estimate ; D.N.B.
[7] J. Hutchison, Notable Middle Templars 144.
[8] Above 439.
[9] Below 666-669.
[10] Extracts from these books are printed in Law Magazine xxxviii 217-233, and xxxix 62-75 ; some of these jottings are in almanacks of which there are a series from 1734 to 1746.
[11] Mrs. Margaret Melmoth.
[12] Campbell, Chief Justices ii 232 *n*.

regarded by his contemporaries as a sound lawyer—more especially, Burrow tells us, in settlement cases.[1]

He presided over the trials of the Jacobite rebels in 1746, at which important points in the law of treason were resolved.[2] But, since Mr. Justice Foster was in the commission, it is probable that the soundness of the legal principles there laid down was due to him quite as much as to the Chief Justice. In the case of *R. v. Owen* [3] he laid down the law as the respective provinces of the judge and jury in prosecutions for libel in the same way as his predecessor Lord Raymond [4] and his successor Lord Mansfield ; [5] but we have seen that young Mr. Pratt, the future Lord Camden, persuaded the jury to take his view that they were entitled to return a general verdict, and to find the prisoner not guilty.[6] His only other decision in the sphere of criminal law which is in any way notable, is the case of *R. v. Westbeer*.[7] That case illustrates the arbitrary limitations imposed by law on the list of things which could be stolen. It was held that a commission to settle boundaries and the commissioners' return were not the subject of larceny, because they were concerned with real property. The Chief Justice thought that the culprit might be guilty of a trespass ; [8] but it was held that he could not be convicted of a trespass on an indictment for felony, and probably not at all.[9]

One or two of Lee's decisions have some constitutional importance. In the case of *Olive v. Ingram* [10] he held that a woman was capable of holding the office of sexton and of voting for a candidate for that office. It is true that women could not vote for members of Parliament and coroners ; but " this being an office that did not concern the publick, or the care and inspection

[1] Burrow tells us that he was cheerful in temper though grave in his aspect ; and that " the integrity of his heart and the caution of his determinations are so eminent that they probably never will, perhaps never can be exceeded," Settlement Cases 328.

[2] 18 S.T. 330 seqq. ; Foster, Report 1-39 ; the main points were that a commission in the French army did not entitle the holder, being a British subject, to be treated as a prisoner of war, R. v. Townley 18 S.T. 348 ; that compulsion, short of a present fear of death, is no defence, R. v. MacGrowther, ibid at p. 394 ; that a Scotsman could be tried in England for a treason committed in England, R. v. Kinlock, ibid 401 ; that the fact that a first jury had been discharged after they had been charged with the prisoner, in order that a point of law might be argued, was no bar to a trial by a second jury, R. v. Kinlock, ibid 405-415—Wright J. dissenting.

[3] (1752) 18 S.T. at p. 1228. [4] Above 439. [5] Vol. x 676-680.
[6] Ibid 480-481. [7] (1740) 2 Stra. 1133. [8] Ibid at p. 1137.

[9] " It was insisted that by this means a defendant is deprived of many advantages ; if he was indicted properly, he might have counsel, a copy of his indictment and a special jury. . . . Besides now felonice is struck out, where there is any breach of the peace, for the verdict doth not find the taking was *vi et armis*. *Et per Curiam*, the prisoner must be discharged ; in the cases cited *pro Rege* the Judges appear to be transported with zeal too far," ibid.

[10] (1739) 2 Stra. 1114.

of the morals of the parishioners, there was no reason to exclude women who paid rates from the privilege of voting." [1] The case of *R. v. Fitzgerald* [2] shows that the secretaries of state were assuming arbitrary powers to imprison, and illustrates the need for the searching inquiry into the extent of those powers which was made in the next reign by Lord Camden.[3] In this case it appears that Fitzgerald had been imprisoned for two years on suspicion of treason, and that no charge had been brought against him. Since the attorney-general could not give an undertaking to prosecute forthwith, the prisoner was discharged without bail. In the case of *Openheimer v. Levy* [4] the court asserted the right of alien friends to bring personal actions in the English courts. These are sound decisions. But it is difficult to defend his ruling that the sentence of a foreign court of Admiralty, that a ship was unfit for a voyage, was no evidence of its unfitness, because the English court of Admiralty had no jurisdiction to determine this question.[5] The Chief Justice was in this case blinded by the traditional jealousy of the common law courts for the Admiralty jurisdiction. The case of *Lampley v. Thomas*,[6] in which, as we have seen,[7] the question at issue was whether the writ of latitat could issue into Wales, was three times argued before him; and though this action abated, a new action was brought which, on these arguments, was decided in the negative.[8]

In the sphere of contract he held, as Holt, C.J., had already held, that a wife deserted by her husband is, in effect, an agent by necessity, and can therefore pledge her husband's credit.[9] He also decided several cases on the scope of the statute against gaming and wagering contracts. A promissory note given for money knowingly lent to game with was held to be void under the statute of Anne, so that an innocent indorsee could not recover from the drawer, though he might recover from his indorser.[10] This decision was followed by Lord Mansfield in a case where a bill was given for a consideration which was usurious and so illegal.[11] On the other hand, a parol contract of loan was not within this statute, so that a person who had advanced money on a parol agreement for the purpose of gaming could recover it.[12] In the sphere of tort, the court, in Lee's absence, held that

[1] At p. 1115.
[2] (1749) 1 Wils. 254.
[3] Vol. x 661-671.
[4] (1738) 2 Stra. 1082; see vol. ix 94-97.
[5] Burton v. Fitzgerald (1737) 2 Stra. 1078.
[6] (1747) 1 Wils. 193.
[7] Vol. i 131.
[8] 1 Wils, at p. 206—a decision which was reversed in 1779, vol. i 131.
[9] Bolton v. Prentice (1745) 2 Stra. 1214; James v. Warren (1707) Holt K.B. 104; vol. iii 530.
[10] Bowyer v. Bampton (1741) 2 Stra. 1155.
[11] Lowe v. Waller (1781) 2 Doug. at p. 744.
[12] Barjean v. Walmsley (1746) 2 Stra. 1249—"the Parliament might think there would be no great harm in a parol contract, when the credit was not like to run very high; and therefore confined the Act to written securities."

a recovery in trover against A, although the judgment was not satisfied, changed the property in the goods [1]—a decision which has not been followed.[2] In the case of *Dale v. Hall* [3] it was attempted to get round the strict liability of a carrier by the plea that, as the plaintiff had not declared against the defendant as a common carrier, the goods were carried under a special contract, so that the carrier was only liable if he was negligent. But Lee refused to accede to this argument. He had in fact taken them as a common carrier, "and everything is a negligence in a carrier or hoyman that the law does not excuse." [4] The case of *Subley v. Mott* [5] illustrates the fact that the action for malicious prosecution had become completely disassociated from the action of conspiracy.[6]

Lee had always been a friend of Hardwicke; and he was called in by Hardwicke to assist him in the two leading cases of *Ryall v. Rowles* [7] and *Chesterfield v. Jansen.*[8] But the most remarkable and most significant feature in the business of the court during the latter part of Lee's tenure of office is the increase in the number of mercantile cases. Besides cases on bills of exchange [9] and promissory notes,[10] there is considerable increase in the number of cases on marine insurance. Such questions as what amounted to barratry of the master, so as to exempt the underwriters from liability; [11] what is such a material circumstance that non-disclosure of it will vitiate the policy; [12] when a ship can be presumed to be lost; [13] when the liability of the underwriter on the cargo [14] or the vessel [15] is at an end; whether a mere intention to deviate would exempt the underwriter, when no deviation had occurred before the loss; [16] whether a deviation under the duress of the crew excused the underwriters; [17] when the underwriter's liability on an insurance of freight began; [18] whether the underwriters were liable for loss if a ship was captured on her way to join a convoy.[19] These cases show that commercial business was increasing, and that the common law needed judges who could settle the principles necessary for the

[1] Adams v. Broughton (1737) Andrews 18.
[2] Brinsmead v. Harrison (1871) L.R. 6 C.P. at pp. 588-590.
[3] (1750) 1 Wils. 281. [4] At p. 282.
[5] (1747) 1 Wils. 210. [6] Vol. viii 389-390.
[7] (1749) 1 Wils. 261 *sub nom.* Ryall v. Rolle; above 282.
[8] (1750) 1 Wils. 286 at p. 294.
[9] Smith v. Abbot (1741) 2 Stra. 1152; Banbury v. Lisset (1745) 2 Stra. 1211.
[10] Collins v. Butler (1738) 2 Stra. 1087.
[11] Stamma v. Brown (1743) 2 Stra. 1173.
[12] Seaman v. Fonereau, ibid 1183. [13] Green v. Brown (1744) 2 Stra. 1199.
[14] Sparrow v. Carruthers (1745) 2 Stra. 1236.
[15] Waples v. Eames (1746) 2 Stra. 1243.
[16] Foster v. Wilmer, ibid 1249.
[17] Elton v. Brogden (1747) 2 Stra. 1264.
[18] Tonge v. Watts (1746) 2 Stra. 1251.
[19] Gordon v. Morley (1747) 2 Stra. 1265.

determination of the problems of commercial law. But it is clear that, since Holt's death, neither the Chancellors nor the judges were competent to perform this task. We have seen that the Chancellors took refuge in the expedient of treating as questions of fact, to be decided on the evidence of the merchants, problems which they ought to have treated as questions of law to be decided by the application of legal principles ;[1] and the judges took refuge in the similar expedient of leaving these questions as questions of fact to the jury. It is true that several of Lee's decisions are cited with approval by Park in his book on Marine Insurance ;[2] but it is also true that he was sometimes too apt to resort to this expedient. Thus in the case of *Banbury v. Lisset*[3] he left it to a jury to say whether an acceptance of a bill of exchange was absolute or conditional—a question which was later held to be a question of law for the court.[4] So long as these expedients were used there could be no great development of the principles of commercial or maritime law. Fortunately for the common law it was soon to get in Lord Mansfield a judge who had the learning, ability, and industry needed to evolve from the evidence of mercantile usage and the verdicts of juries of merchants, the principles of commercial and maritime law, which were needed to govern the business of the merchants and shipowners.[5]

Lee's immediate successor was Dudley Ryder (1692-1756),[6] who only held his office for two years. Ryder was called to the bar by the Middle Temple in 1719,[7] and migrated to Lincoln's Inn in 1725.[8] At the beginning of his career he owed much to the patronage of Peter King,[9] who, like him, came of non-conformist parentage and had been a student at Leyden. King introduced him to Walpole's notice, and after that, his own abilities and industry ensured his success. He became solicitor-general in 1733, and attorney-general in 1737. He spoke effectively in the House of Commons in defence of government measures, but was criticized by Horace Walpole as too diffuse. Waldegrave hit off his character when he described him as an "honest man and a good lawyer, but not considerable in any other capacity."[10] He was appointed Chief Justice of the King's Bench in 1754. His past services and his conduct as Chief Justice were about to be rewarded by a peerage, but he

[1] Above 282.
[2] J. A. Park, Marine Insurance (1st ed.) 44, 97, 352, 393.
[3] (1745) 2 Stra. at p. 1212.
[4] Sproat v. Mathews (1786) 1 T.R. at p. 186 *per* Buller J. ; below 491, 527-528.
[5] Below 524-529.
[6] Foss, Judges viii 164-166 ; Campbell, Chief Justices ii 233-265 ; D.N.B.
[7] J. Hutchison, Notable Middle Templars 213.
[8] Lincoln's Inn, Admissions i 394.
[9] Above 210-214.
[10] Memoirs 56.

died in 1756 just before the formalities had been completed. During his short tenure of office there were no cases of any very great importance decided by him.[1] The case of *Taylor v. Horde*,[2] which is famous for Lord Mansfield's attempt to rationalize the law as to seisin and disseisin [3] had been argued before him; but he died before he could give judgment. His death opened the way for the accession of Lord Mansfield.

Of the two most distinguished of the Chief Justices of the Common Pleas—Peter King [4] and John Willes [5]—I have already spoken. The other three were able but not particularly distinguished lawyers. Thomas Trevor [6] (1658-1730), the son of a secretary of state, and, through his mother, the grandson of John Hampden, became solicitor-general in 1693 and attorney-general in 1695. He refused the post of Lord Keeper in 1700, and became Chief Justice of the Common Pleas in 1701. He was reappointed to that office on the accession of Anne, and held it all through her reign. Trevor had never been prepared to go all lengths with the Whig party. He had voted against Fenwick's attainder, and the expulsion of Duncombe from the House of Commons. Thus it is not altogether surprising that he went over to the Tory party, and consented to be made one of the twelve peers who were created in 1711 in order to carry the treaty of Utrecht through the House of Lords. When George I came to the throne Cowper, while admitting that he was an able man, recommended that, on account of his Tory principles, he should not be reappointed Chief Justice.[7] This advice was followed, and Peter King was made Chief Justice. For some time Trevor acted with the Tory party—opposing both the septennial Act and the bill of pains and penalties against Atterbury. But, like Harcourt,[8] he realized that a Stuart restoration was impossible, and made his peace with the

[1] In the case of R. v. Hood (1754) Sayer 161 he held that an indictment for violently knocking at the prosecutor's door for two hours, whereby his family was disturbed and his wife was so frightened that she miscarried, ought not to be quashed; in R. v. Day (1755), ibid 202, he held that an inferior court cannot grant a new trial; in R. v. Ponsonby (1755), ibid 245, he held that judgment of ouster could not be given on an information in the nature of a *quo warranto*.

[2] The report of the argument before Ryder C.J. in 1755 is in 1 Kenyon 143-216; at p. 217 there is the following entry: "Sir Dudley Ryder C.J. of the King's Bench, dying in Easter Term 1756, before judgment was given, and Lord Mansfield being made C.J.; the above case was argued again by Mr. Caldecot for the plaintiff, and Mr. Knowler for the defendant, in Michaelmas Term, 1756"; see 1 Burr. 60.

[3] Vol. vii 43-44; for the facts of the case and the decision see ibid 55-56.

[4] Above 210-214. [5] Above 132. [6] Foss, Judges viii 71-76; D.N.B.

[7] Cowper said of him "he is an able man, but made one of the twelve lords, wch. the late ministry procur'd to be created at once (in such haste, yt few, if any, of their patents had any preamble, or reasons of their creation), only to support *their peace*, wch. the House of Lords, they found, would not without that addition. From that time at least, he went violently into all the measures of that ministry, and was much trusted by them," cited Foss, Judges viii 73.

[8] Above 201-203.

government. He was made Lord Privy Seal in 1726, and Lord President of the Council in 1730. He died in the same year. His successor Robert Eyre (1666-1735) [1] was the son of a judge of the court of King's Bench. He became solicitor-general in 1707, and was one of the managers of Sacheverell's impeachment in 1710. In the same year he was made a judge of the court of King's Bench. In George I's reign he was made Chancellor to the Prince of Wales; and it was mainly for that reason that he differed from his brethren as to the King's prerogative to control the education and marriage of the Prince's children. In 1723 he became Chief Baron of the Exchequer, and in 1725 he succeeded Peter King as Chief Justice of the Common Pleas. He was an able lawyer, and a friend of three of the most distinguished statesmen of the day—Godolphin, Marlborough, and Walpole. He died in 1735.[2] His successor was Thomas Reeve,[3] who had been a judge of the court since 1733. That he was an able lawyer is shown by his conduct of the bill against Atterbury, and also by his argument for the widow of Castell, who brought an appeal of murder against Bambridge for causing the death of her husband. His tenure of the office of Chief Justice was short, as he died in 1737. With the career of his successor John Willes I have already dealt.[4] His judgments reported by himself show that he was perhaps the most able of all the Chief Justices of the Common Pleas of this period. They state clearly the point at issue, and determine it in the concise and pointed language which betokens a complete mastery of legal principles and of the complex rules of procedure and pleading.

The jurisdiction of the court of Common Pleas was far less extensive than the jurisdiction of the court of King's Bench. It was confined to common pleas; and since the court of King's Bench had succeeded in encroaching upon its jurisdiction over common pleas,[5] and could offer other procedural advantages to litigants,[6] the number of cases which came before the court was considerably less than the number of cases which came before the court of King's Bench. But, in spite of the competition of the court of King's Bench, it played a considerable part in the development of many branches of the common law.

Though the rise of the action of ejectment, and the consequent decadence of the real actions,[7] had deprived the court of its exclusive jurisdiction over the development of the law of real

[1] Foss, Judges viii 121-123; D.N.B.

[2] He was accused of aiding and abetting Thomas Bambridge in his cruelties to prisoners in the Fleet, but a committee of the House of Commons reported that the accusation was "false, malicious, groundless, and utterly scandalous," Foss, Judges viii 123.

[3] Ibid 158-159; D.N.B. [4] Above 132. [5] Vol. i 218-222.

[6] Harg. Law Tracts 369-370; vol. i 200. [7] Vol. vii 9.

property, cases connected with this branch of the law were one of the most important branches of its jurisdiction. This fact is brought out by some of the decisions of Willes, C.J. In the case of *Eaton v. Southby* [1] he pointed out that the distinction between a real and a personal action depended, not on the nature of the defence, but on the question whether anything real could be recovered by the action; and that therefore the action of replevin was not a real action.[2] We have seen that in the case of *Dormer v. Parkhurst* [3] he held that a remainder to trustees to preserve contingent remainders was a vested remainder, and so was effectual to prevent the destruction of contingent remainders by the tenant for life and the vested remainderman, as well as by the forfeiture or merger of the preceding estate of freehold. In the case of *Chatwode v. Crew* [4] he restated the old rules that there could be no court baron in a manor unless there were at least two freehold tenants holding of the lord of the manor, and that the lord could not convey land in fee simple to be held of himself at the present day. In the cases of *Milburn v. Salkeld* [5] and *Wilkinson v. Tranmarr* [6] he considered in some detail the nature and operation of the covenant to stand seised. In the latter case he held that a deed of release which was void, because it attempted to convey a freehold *in futuro*, could be construed as a covenant to stand seised, and ought to be so construed, in order to give effect to the intentions of the parties [7] —a principle which has been approved of in a modern case.[8] In the case of *Cowper v. Verney* [9] he made it clear that tenants for life who had a power to lease must follow strictly the terms of the power—otherwise their leases would be void. There are several cases in which the nature of such incorporeal things as rights of way,[10] tolls,[11] ferries,[12] rights of common,[13] and rights to fish [14] are elucidated. In the last cited case a clear distinction

[1] (1738) Willes 131.

[2] "If the nature of the defence would make a difference, actions of trespass wherein the title of land is brought in question by the plea, and actions of debt for rent wherein the title of land may come in question . . . must be considered real actions; which yet would be most absurd," at p. 134.

[3] (1741) Willes 327; vol. vii 112-113.

[4] (1746) Willes 614; vol. i 182-184.

[5] (1755) Willes 673. [6] (1757) Willes 682.

[7] "In the case of *Crossling v. Scudamore* (2 Lev. 9; 1 Ventr. 137; and 1 Mod. 175) Lord Ch. J. Hale cites the opinion of Lord Hobart in fo. 277 and declares himself to be of the same opinion, that the judges ought to be curious and subtle (Lord Hobart used the word astuti) to invent reasons and means to make acts effectual according to the just intent of the parties," at p. 684.

[8] *In re* Johnston, Foreign Patents Co. [1904] 2 Ch. at p. 247.

[9] (1739) Willes 169. [10] Chichester v. Lethbridge (1738) Willes 71.

[11] Mayor of Nottingham v. Lambert (1738) ibid 111.

[12] Blissett v. Hart (1744) Willes 508.

[13] Bennett v. Reeve (1740) Willes 227.

[14] Ward v. Creswell (1741) Willes 265.

is drawn between a right to fish in the sea, which, being a general right of all the King's subjects, is not appurtenant to tenements and cannot be prescribed for, and a right to fish in a river, which may be appurtenant to tenements and can be prescribed for.[1] In addition, there are many cases turning upon the construction of settlements and devises which helped to elucidate the law. The statutes which disabled Roman Catholics educated abroad from holding land,[2] gave rise to a case in which Trevor, C.J., held in an elaborate judgment, which was upheld by the House of Lords, that a recovery suffered by such a person was valid.[3]

In the sphere of the personal actions the contribution made by the court of Common Pleas to the development of the law is less considerable.

Section 4 of the statute of Frauds gave rise to two cases on the law of contract. The case of *Barker v. Lamplugh* [4] is a decision which confuses a contract to answer for the debt, default, or miscarriage of another person with a contract of indemnity, and erroneously holds that the statute applies to the latter contract. The case of *Cork v. Baker* [5] lays it down that the section applies only to contracts made in consideration of marriage, and not to contracts to marry. The case of *Williams v. Johnson* [6] is a curious case of a family quarrel. The plaintiff sued "the daughter's husband for her wedding cloaths." The defence was that the goods were supplied on the credit of her father; and King, C.J., did substantial justice by allowing the mother to be a witness against her husband to prove this fact—a decision which was later repudiated by Lord Kenyon.[7]

The decisions on the law of tort are more important. The most important is the case of *Winsmore v. Greenbank*,[8] in which Willes, C.J., held for the first time that an action on the case lay against a person who had enticed away the plaintiff's wife, whereby he lost her consortium. He held that the fact that there was no precedent for such an action was no objection to its competence:

> A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy: but there must be new facts in every special action on the case.[9]

Both damage and injuria must be proved; and

> by injuria is meant a tortious act: it need not be wilful and malicious; for though it be accidental, if it be tortious an action will lie.[10]

[1] At p. 268.
[2] 1 James I c. 4; 3 Charles I c. 2.
[3] Thornby v. Fleetwood (1711) 1 Stra. 318; (1720) 5 Bro. P.C. 374.
[4] (1706) 1 Comyns 142.
[5] (1725) 1 Stra. 34.
[6] (1722) 1 Stra. 504.
[7] Davis v. Dinwoody (1792) 4 T.R. 678.
[8] (1745) Willes 577.
[9] At p. 581.
[10] Ibid.

The case of *Bird v. Line* [1] shows that the question whether an action would lie for maliciously taking civil proceedings was not settled. Trevor, C.J., inclined to the view that it would lie if the proceedings had terminated in the plaintiff's favour.[2] In the case of *Stone v. Lingwood* [3] Eyre, C.J., held that a bailee of goods, who had paid the duty on goods, could not claim to retain the goods till he was reimbursed; but that his remedy was to bring a separate action for damages—a ruling from which Lord Mansfield dissented.[4] But in the case of *Grammar v. Nixon* [5] he perhaps anticipated a modern decision,[6] and held that a goldsmith was liable for the fraud of his apprentice.[7] In the case of *Moravia v. Sloper* [8] Willes, C.J., held that if a defendant, in an action for assault and false imprisonment, pleads a justification under the process of an inferior court, he must prove that the court had jurisdiction; but that the law is otherwise if the defendant is an officer of the court, because "he is obliged to obey the process of the court and is punishable if he do not" [9] —a decision which has been followed in the nineteenth century.[10]

The question whether, in an action for words, a defendant, who had pleaded the general issue, could produce evidence to prove their truth in order to mitigate damages, was referred to all the judges. They held by a majority of eight to four that this evidence was not admissible; [11] and thus originated the important rule that matters which, if pleaded and proved, are a bar to the action, cannot be given in evidence in mitigation of damages.[12] A curious case reported by Strange shows that there were limits to a husband's control of his wife's actions.[13] Two women had a scolding match and each called the other whore. They brought cross actions against one another in the ecclesiastical court. The two husbands agreed to stay these proceedings; "and upon one of the wives going on, the husband moved for a prohibition; but denied, for *per Curiam*, the suit is by the

[1] (1710) Comyns 190. [2] At p. 193. [3] (1726) 1 Stra. 651.

[4] Green v. Farmer (1768) 4 Burr. at p. 2218.

[5] (1726) 1 Stra. 653—the apprentice had sold an ingot of gold and silver with a warranty that it was of the same value with an assay then shown; it appeared that the assay was forged, and that the ingot was made out of a lodger's plate which he had stolen.

[6] Lloyd v. Grace Smith and Co. [1912] A.C. 716.

[7] The ground of the decision is not stated—it may have been founded on the view that the apprentice had implied authority to make such a contract on behalf of his master.

[8] (1737) Willes 30. [9] At p. 33.

[10] Hill v. Metropolitan Asylum District (1879) 4 Q.B.D. at p. 441.

[11] Smith v. Richardson (1737) Willes 20.

[12] See Watt v. Watt [1905] A.C. 115 where Lord Halsbury said at p. 118, "even in mitigation of damages it is well settled you cannot go into evidence which, if proved, would constitute a justification"; Blake Odgers, Libel and Slander (5th ed.) 393, 695.

[13] Tarrant v. Mawr (1724) 1 Stra. 576.

wife, to recover her fame, and it is not in the power of the husband to restrain her."

It thus appears that some important additions to the law of tort were made by the court of Common Pleas. But it is also clear that many of the personal actions brought in that court were trivial. There is a case of an action of trespass for breaking a water-pail in which 1s. was awarded in damages ; [1] and other cases, in one of which trover was brought for a couple of fowls, and in another for a spare rib of pork.[2] Such cases illustrate the decadence of the old local courts, and the need for those new courts of conscience which the Legislature set up in different places during this century.[3]

Executors and administrators could sue and be sued for debts due to and from the deceased ; and the common law had developed a body of rules which were very technical, and sometimes not very rational. Thus in the case of *Earle v. Hinton* [4] Eyre, C.J., ruled that if an executor had assets to the amount of £100, and two creditors for £100 brought actions for their debts, the executor must suffer judgment in one of these actions, and then plead that judgment in bar of the other. If he suffered judgment in both actions, he would be obliged to pay on both judgments, because

> it is a settled rule in law, that if a defendant has a matter proper for his defence, and he neglects to plead it in bar to the action at the time he may, he shall never take advantage of it after.

In the case of *Shipman v. Thompson* [5] it was held that an executor could sue in his own name for money due to his testator, and that, if he sued in his own name, the defendant could not set off any cross demands he had against the deceased, because the right to set off, given by a statute of 1729,[6] only applied to mutual debts as between plaintiff and defendant, or to cases where the party sues or is sued as executor or administrator. In the case of *Marriott v. Thompson* [7], Willes, C.J., gave the right historical explanation of the executor's right of retainer when he said that it existed " because he cannot sue himself, and the law will never suffer that a right should be without a remedy."

It is clear from Cooke's reports that a very large number, perhaps the largest number, of cases in the court of Common Pleas turned on the management of the complicated procedure

[1] Parke v. Davis (1728) Cooke 49.

[2] " In trover the defendant moved to bring a note into court ; Mr. Searjeant Darnell declared he had moved for and obtained a rule, to bring into court two fowls in one term, and the next term a spare rib of pork or money in lieu thereof," Tuney v. Clarke (1730) Cooke 59.

[3] Vol. i 190-191.

[4] (1727) 1 Stra. 732.

[5] (1738) Willes 103, and note to the case.

[6] 2 George II c. 22 § 13.

[7] (1739) Willes at p. 188 ; cp. vol. iii 588-589.

of the court, and upon the rules of pleading. This is no doubt to some extent true of the court of King's Bench; but the larger jurisdiction of that court made these cases smaller in proportion to the total mass of business than they were in the court of Common Pleas. We have seen that the law on these topics was made up of a complex mass of mediæval and modern rules.[1] Mediæval rules of procedure might give rise to debate—for instance, the question whether an essoin could be cast in a personal action,[2] and the proper procedure on the writ *de ventre inspiciendo*.[3] More modern rules are represented by cases which turned on such matters as the payment of money into, and taking it out of, court;[4] the award of costs, and attachments for their non-payment;[5] whether a notice to appear on a Sunday was a valid notice;[6] whether in an action against husband and wife the wife only could be arrested on mesne process;[7] the procedure upon a writ of *de homine replegiando*;[8] whether a person attached for contempt could be released on bail;[9] the very summary process used when a direct and flagrant contempt of court was proved;[10] the right of poor prisoners to an allowance out of the poor box.[11] Many cases turned on points of pleading. What pleas must be signed by a serjeant;[12] the need for maintaining the regular form of pleas;[13] the proper time for pleading the statute of limitations;[14] when a defendant could "plead double"; and what double pleas were disallowed because they were contradictory.[15]

These branches of adjective law, and the branches of substantive law which fell within the jurisdiction of the court,

[1] Vol. ix 247. [2] Symonds v. Mayor of Totness (1713) Cooke 8.
[3] Ascough v. Lady Chaplin (1730) Cooke 62.
[4] Anon. (1712) Cooke 5.
[5] Spencer v. Le Royd (1728) Cooke 51; very many cases reported by Cooke are concerned with the subject of costs.
[6] Lloyd v. Beeston (1734) Cooke 100.
[7] Blik v. Halfpenn (1735) Cooke 117; it was held that the wife must be released, "for otherwise it might be in the power of a husband to set up sham actions against his wife and keep her in continual imprisonment."
[8] Ilatt v. Lisset (1728) Cooke 39.
[9] Field v. Walford (1718) Cooke 14.
[10] "A motion for an attachment against the defendant for cursing the Chief Justice and Court on service of process; the words were G—d d—n the Lord Reeves and the Court, and that he neither cared for him or them; and an attachment was granted absolute, without any rule to show cause, that being the constant method for a contempt of this nature," Phillips v. Hedges (1736) Cooke 132.
[11] Anon. (1721) Cooke 21. [11] Upton v. Pullyn (1728) Cooke 41.
[13] "On a piece of stampt paper the defendants say they are not guilty, without delivering the plea at length; the plaintiff signed judgment for want of a plea. The Court said it was no defence, so the judgment was held regular," Albany v. Griffin (1736) Cooke 126; attornies could be made to pay costs if they were too prolix in their pleadings, Mackdonnel v. Gunter (1736) Cooke 128; and serjeants if they disregarded the rules of pleading, Richardson v. Sutton (1728) Cooke 51.
[14] Leaver v. Whicker (1736) Cooke 139.
[15] Clarke v. Swift (1738) Cooke 153-154.

were old branches of the common law, which had become the centres of bodies of technical and elaborate rules. They were a very static and a comparatively unprogressive side of the common law; and the elaborate discussions to which they gave rise must have added both to the expense and dilatoriness of litigation. On the other hand, a case like *Winsmore v. Greenbank* [1] shows that the court was not wholly impervious to the need to make new developments in the law. In fact, even in the court of Common Pleas, which was less progressive than either the court of Chancery or the court of King's Bench, the developments which were taking place in other courts, and the exigencies of litigants were, at the end of this period, making for the reception of new ideas. The new developments which were taking place in the court of Chancery were constantly present to the minds of the judges of the courts both of Common Pleas and King's Bench; for in important cases, their judges were called in to assist the Chancellor; [2] and where the jurisdiction of these courts and the court of Chancery were to some extent concurrent, as, for instance, in cases which turned upon the interpretation of devises, cases decided in the court of Chancery were cited and relied upon or distinguished.[3] So, too, in the court of Common Pleas, as in the court of King's Bench, the growing number of commercial cases made for the introduction of new ideas. Though the number of commercial actions brought in the court of Common Pleas was probably smaller than the number brought in the court of King's Bench, a certain number were brought there. There are actions on insurance policies,[4] on bills of exchange,[5] and on promissory notes; [6] and it is significant that in one of these actions on a promissory note, counsel cited the books of the civilians on a point in the law as to bills of exchange, and that Willes, C.J., cited the opinion of Scaccia, *De Commerciis*, and treated it as decisive.[7] It is clear that in the court of Common

[1] Above 450.

[2] See e.g. Ginger v. White (1742) Willes at p. 356; Omichund v. Barker (1744-1745) ibid 538.

[3] Roe v. Wickett (1741-1742) Willes at pp. 313-314; in the case of Gott v. Atkinson (1744-1745) Willes at p. 524, Willes C.J. contrasts the legal and equitable rules as to the payment of debts out of the assets of a deceased person—equitable assets, he said, are always distributed equally amongst the creditors.

[4] Knight v. Cambridge (1724) 2 Ld. Raym. 1349; above 445.

[5] More v. Manning (1719) 1 Comyns 311; Wilkinson v. Lutwidge (1726) 1 Stra. 648.

[6] Jefferies v. Austin (1726) 1 Stra. 674.

[7] "Upon this head it would be but mispending time to run over all the passages which have been cited out of the civil law books in relation to bills of exchange, because I put a question to the counsel which will I think determine this point, whether there is any limited time mentioned in any of the books beyond which if bills of exchange are made payable they are not good, and it was agreed by the counsel that they could find no such rule, and I am sure I can find none. . . . There is but one passage in the books wherein any notion to the contrary is so much as

Pleas, as in the court of King's Bench, new problems were making it clear that new developments in the common law were imminent.

During this period there was a long list of Chief Barons of the Exchequer, some of whom held that office for very short periods.[1] Of the most notable of these Chief Barons I have already spoken. Jeffrey Gilbert (1674-1726) was the most prolific legal author of this period and the ablest before Blackstone.[2] John Comyns (1667-1740) is famous partly for his reports, but more especially for his Digest, which, as we have seen, marks the transition stage between the older abridgments and the modern legal encyclopædias.[3] Thomas Parker (1695-1784) compiled a volume of revenue cases in the Exchequer, which prove that he was a master of the law and practice of the revenue side of his court.[4] Of the other Chief Barons, the first was Edward Ward (1638-1714), who succeeded Atkyns as Chief Baron in 1695, and held his office till his death in 1714.[5] He was succeeded by Samuel Dodd (1652-1716) who died in 1716.[6] His successor, Thomas Bury (1686-1722), held office for six years ;[7] and his successor James Montagu (1666-1723), who came of a distinguished legal family, only held office for one year.[8] His successor, Robert Eyre (1666-1735), belonged to a family which might be fairly called judicial, since four of its members were raised to the bench in the course of the eighteenth century.[9] He only held the office of Chief Baron for eighteen months, since he was promoted in 1725 to the post of Chief Justice of the Common Pleas.[10] His successor, Jeffrey Gilbert,[11] only held his office for fifteen months. Thomas Pengelly (1675-1730) succeeded Gilbert in 1726. He was a leader of the bar, and a very able and conscientious advocate and lawyer. After holding his office for four and a half years, he was killed by gaol fever, which he and many others caught from the prisoners whom he was trying at Taunton in 1730.[12] This warning of the consequences

hinted at ; and that is in Scacchius de Commerciis, where it is said that it had formerly been an objection against a bill of exchange . . . that it was made payable at the end of seven months," Colehan v. Cooke (1742-1743) Willes at p. 396.

[1] Above 431 n. 3.

[2] Above 140-141, 352 n. 1.

[3] Vol. vi 553, 563 ; above 168-169.

[4] Above 133.

[5] Foss, Judges vii 406-408 ; D.N.B.

[6] Foss, Judges viii 28-29 ; D.N.B.

[7] Foss, Judges viii 17-18 ; D.N.B. ; he supported the dissenting judgment of Holt C.J. in the case of Ashby v. White, which was upheld by the House of Lords.

[8] Foss, Judges viii 41 ; D.N.B. ; he was grandson of Henry Montagu, first Earl of Manchester, who was Coke's successor as Chief Justice of the King's Bench in James I's reign, vol. v 441 and n. 2.

[9] Foss, Judges viii 121-123 ; D.N.B. ; above 448 ; he was son of Samuel Eyre and cousin of Giles Eyre, judges of the King's Bench in William III's reign, and connected with James Eyre who was Chief Baron of the Exchequer in 1787, and Chief Justice of the Common Pleas in 1793, Foss, Judges viii 282 ; below 565-568.

[10] Above 448.

[11] Above 140-141.

[12] Foss, Judges viii 147-149 ; D.N.B. ; a short tract written by " a Lady his intimate friend," and entitled " Some Private Passages of the Life of Sir Thomas Pengelly " (1733), gives a very eulogistic account of his character.

of neglecting the gaols produced no effect. Twenty years later at the Black Sessions at the Old Bailey gaol fever killed two judges,[1] the lord mayor, one of the aldermen, and several counsel and jurymen.[2] Pengelly's successor was James Reynolds (1686-1739). He resigned in 1738, and died in 1739.[3] Comyns,[4] who had held the offices of baron of the Exchequer and judge of the Common Pleas, succeeded Reynolds in 1738; but he only held that office for a little over two years. He was succeeded by Edmund Probyn (1678-1742) who died eighteen months later.[5] His successor was Thomas Parker who, as we have seen, held his office for thirty years.[6]

The jurisdiction of the court of Exchequer was more varied than that of the other two common law courts, for, as we have seen,[7] it included a revenue jurisdiction and an equitable jurisdiction, besides a common law jurisdiction.

Of these different branches of jurisdiction its revenue jurisdiction was the most important. It gave rise to a special and very technical body of law; for it concerned the Crown and those prerogatives of the Crown, which were, as Blackstone said,[8] "exceptions in favour of the Crown to those general rules that are established for the rest of the community"; so that, as Finch had said in the seventeenth century, the prerogative was "that law in case of the king which is no law in case of the subject."[9] The Crown had, for instance, special procedural privileges to facilitate the collection of its debts,[10] and the defendant was under special disabilities.[11] And this body of law covered much ground. There are cases which turn on such questions as the right of the Crown to a ship which had imported goods contrary to the provisions of the Navigation Act;[12] the right of the Crown to the real property of an alien;[13]

[1] Abney J. and Clarke B.

[2] Foss, Judges viii 96-97; Dickens in his Tale of Two Cities was quite correct when he said of Newgate gaol that it was "a vile place . . . where dire diseases were bred, that came into court with the prisoners, and sometimes rushed straight from the dock at my Lord Chief Justice himself, and pulled him off the bench," and that "it had more than once happened that the Judge in the black cap pronounced his own doom as certainly as the prisoner's, and even died before him"; for the gaols see vol. x 181-183.

[3] Foss, Judges viii 160-162; D.N.B.

[4] Vol. vi 563; above 168-169.

[5] Foss, Judges viii 154-155; D.N.B.

[6] Above 133.

[7] Vol. i 238-242.

[8] Comm. i 240; cp. vol. iii 459.

[9] Cited Bl. Comm. i 239; for Finch and his book see vol. v 399-401.

[10] See e.g. R. v. Enderupp (1723) Bun. 134—the right of the Crown to issue an extent against the debtor of its debtor; R. v. Clark (1726) 1 Comyns 388, where the limitations to this right of the Crown are discussed.

[11] Thus if there was a distress for a duty owed to the Crown, the person distrained could not replevy, R. v. Oliver (1717) Bun. 14; in Attorney-General v. Allgood (1743) Parker 1, it was held that the Act of 4 Anne c. 16, allowing several pleas, did not apply to an information of intrusion by the Crown.

[12] Scott v. A'Chez (1743) Parker 21.

[13] Attorney-General v. Duplessis (1752) Parker 146.

the liability of ships taken as prize to pay customs duties ;[1] the power of justices of the peace to take recognizances for the appearance before the court of Admiralty of a person charged with a criminal offence ;[2] rival claims by the Admiralty and the customs to a forfeited ship.[3]

At all periods in legal history the decision of revenue cases has sometimes involved a consideration of fundamental legal principles ; for, though the law applicable to these cases is often in many respects exceptional, it is sometimes founded upon and presupposes the existence of common law principles, so that it is often necessary to ascertain both the common law principle applicable and the extent to which the rights of the Crown are subject to exceptional rules. This is occasionally true even to-day[4]—though the greater elaboration of modern revenue statutes generally makes it unnecessary to discuss principles, and confines the court to guessing the meaning of the obscure phraseology in which these statutes are expressed.[5] But in the eighteenth century, when the statutes were less elaborate, and when some branches of the revenue depended on the common law rights of the Crown, the judgments in them are often valuable expositions of the principles of the common law. Thus the case of *Attorney-General v. Duplessis*[6] contains a valuable analysis of the Crown's right to the real property of an alien, directed to prove that the disability of an alien, like the disability of a bastard to inherit, and unlike the disability of a papist, is not a penalty, but an incapacity, so that the alien cannot object to proceedings to discover whether he or she is or is not an alien. Similarly, the case of *Attorney-General v. Perry*[7] raised the question whether money, fraudulently obtained as a drawback on the exportation of goods, could be recovered by the Crown, though it had come to the hands of an innocent third person. It was held that it could, not on the ground of a special prerogative of the Crown, but on the general principle of the common law that,

[1] Camplin v. Bullman (1761) Parker 198.

[2] R. v. Muilman and Macky (1766) Parker 241.

[3] Score v. the Lord Admiral (1709) Parker 273. There was a curious case in 1709—Bruse v. Attorney-General, Parker 274—in which it was held that French wine imported from Holland by the Queen for her personal use was not forfeited by the Act of 3 Anne c. 13.

[4] E.g. the case of O'Grady v. Wilmot [1916] 2 A.C. 231, which was an estate duty case, involved the discussion of the distinction between legal and equitable assets.

[5] The threat to take cases upon the interpretation of these statutes to the House of Lords makes it possible for the officials of the inland revenue to put an inequitable pressure on the subject to pay demands of dubious legality ; it would be a salutary check if the old principle of the personal responsibility of officials were applied, and the court were given power, in the case of vexatious appeals, to order the officials responsible to pay some part of the costs.

[6] Parker 144 at p. 157.

[7] (1734) 2 Comyns 481.

whenever a man receives money belonging to another without any reason, authority, or consideration, an action lies against the receiver as for money received to the other's use; and this, as well where the money is received through mistake under colour, and upon an apprehension, though a mistaken apprehension of having a good authority to receive it, as where it is received by imposition fraud and deceit in the receiver.[1]

The cases which fell within the equitable jurisdiction of the Exchequer were of the same general character as the cases which fell within the equitable jurisdiction of the court of Chancery. The following are a few illustrations: Judgment creditors and creditors by decree in equity ought to be paid by an executor *pari passu*.[2] A devise to a wife for her separate use vests the property in her though no trustee is appointed.[3] A voluntary conveyance made by a deceased person could be set aside in favour of his speciality creditors.[4] Following the case of *Earl of Bath v. Sherwin*,[5] the court issued a perpetual injunction to stop repeated actions of ejectment brought to try the same title.[6] Moreover, there was one matter in which the court seems to have had a larger share of jurisdiction than the court of Chancery. That was litigation relating to tithes. For some reason—perhaps because the court had a common law as well as an equitable jurisdiction—tithe cases were generally taken to the court of Exchequer.[7]

The cases which fell within the common law jurisdiction of the court illustrate and enforce rather than develop the principles of the common law. Thus the case of *Etriche v. An Officer of the Revenue*[8] illustrates the distinction, drawn by Pratt, C.J., in the case of *Bushel v. Miller*,[9] between trover and trespass. It was there held that though trespass might lie against the defendant for seizing goods and putting them in the customs warehouse, trover would not lie. In the case of *Earl of Chesterfield v. Duke of Bolton*,[10] *Paradine v. Jane*[11] was followed, and it was held that the fact that a house was accidentally burnt

[1] At p. 491.
[2] Peploe v. Swinburn (1719) Bun. 48.
[3] Rollfe v. Budder (1724) Bun. 187.
[4] St. Amand v. Countess of Jersey (1717) 1 Comyns 255.
[5] (1709) 4 Bro. P.C. 373; vol. vii 17.
[6] Barefoot v. Fry (1723) Bun. 158—the defendant had brought five actions of ejectment in three of which he had been nonsuited, and in the other two had verdicts against him; he had brought two bills, one in the court of Chancery and one in the court of Exchequer, both of which had been dismissed.
[7] See e.g. Smith v. Johnson (1713) Bun. 1; Keddington v. Bridgman (1715) ibid 2; Underwood v. Gibbon (1715) ibid 3; Bokenham v. Bentfield (1727) 1 Comyns 392; Wallis v. Pain and Underhill (1726) 2 Comyns 633; Aldermen of Bury St. Edmunds v. Evans (1726) 2 Comyns 643.
[8] (1720) Bun. 67; later there was a further discussion whether trespass or case lay, Israel v. Etheridge (1721) ibid 80.
[9] (1718) 1 Stra. 128; vol. vii 419.
[10] (1726) 2 Comyns 627.
[11] (1648) Aleyn 26; vol. viii 64.

was no answer to an action on a covenant to keep it and leave it in repair. The question of what contracts came within the usury Acts was considered in the case of *Grant v. Gordon.*[1] It was held that a contract not to sue for a debt in consideration of a lump sum did not come within these Acts. In the case of *Viscount Falkland v. Phipps*[2] it was held that, after the union with Scotland, peers of Scotland could bring an action of *scandalum magnatum.*[3] As in the other courts of law,[4] the disabilities with respect to the ownership of real property inflicted on Roman Catholics, gave rise to litigation ;[5] and speculations in South Sea stock gave rise to one or two cases on the equity side of the court.[6] Some of the cases in which a writ of prohibition was applied for to the ecclesiastical courts[7] or the court of Admiralty,[8] raised questions as to the extent of the jurisdiction of those courts, and sometimes involved a consideration of the law applicable to the case.

Most of the leading lawyers of the day rose to be law officers of the Crown and the heads of the courts of law and equity. But there are one or two who, though they rose to be law officers, never reached the bench. Sir John Hawles (1645-1716)[9] was solicitor-general 1695-1702. He was a sturdy Whig, and after he ceased to be solicitor-general, he continued to sit in Parliament, and was one of the managers of Sacheverell's impeachment. Besides writing a comment on some of the notable trials of Charles II and James II's reigns,[10] he wrote popular accounts of the grand jury and the petty jury in the form of dialogues between a barrister and a juryman.[11] Though weak in their history, they give a clear description of the jury's rights and duties, and good advice as to the conduct of jurymen. They

[1] (1735) 2 Comyns 583.
[2] (1734) 2 Comyns 436.
[3] For this action see vol. iii 409-410.
[4] Above 450.
[5] Jones v. Meredith (1726) 2 Comyns 661.
[6] Awbrey v. Fitzhught (1721) Bun. 84; Cappur v. Harris (1723) ibid 135; Anstruther v. Christie (1724) ibid 178.
[7] E.g. Rebow v. Bickerton (1721) Bun. 81—a prohibition to the ecclesiastical court to prevent it deciding whether a lighthouse was liable to a church rate; Butler v. Gastrell (1723) ibid 145—application for a prohibition to the ecclesiastical court which involved a consideration of the question of a marriage within the prohibited degrees; Ferguson v. Cuthbert (1728) ibid 260, and Head v. Winton (1731) ibid 312—applications for a prohibition to prevent the ecclesiastical court hearing an action for slander.
[8] Minnett v. Robinson (1722) Bun. 121—prohibition in respect of an action for a mariner's wages refused.
[9] D.N.B.
[10] Remarks upon the Tryals of E. Fitzharris, S. College, Count Koningsmark, the Lord Russell (1689).
[11] The Englishman's Right; a Dialogue between a Barrister-at-Law and a Juryman; plainly setting forth, I the Antiquity; II the excellent designed use; III the Office and just privileges of Juries (1680); The Grand-Jury-Man's Oath and Office explained; and the Rights of Englishmen asserted. A dialogue between a Barrister-at-Law, and a Grand-Jury-Man (1680).

were popular in America, and were reprinted there in 1693, 1772, and 1797.[1] Sir Edward Northey (1652-1723),[2] who was attorney-general 1701-1707 and 1710-1714, never attained judicial rank; and there is little material, except some of his opinions printed in Chalmers's collection of Opinions,[3] by which we can judge of his abilities. Sir Clement Wearg (1686-1726),[4] who appeared for the Crown against Layer and Atterbury, and, with Pengelly, was one of the leading managers of Macclesfield's impeachment,[5] was made solicitor-general in 1724. The specimens of his oratory which are contained in Duke's memoir show that he was a master of terse and forcible reasoning; and if his life had not been cut short by a premature death he would probably have attained a high judicial position.

Nicholas Lechmere (1675-1727),[6] who was one of the managers of Sacheverell's impeachment, and appeared for the Crown on the trial of Lord Derwentwater, was solicitor-general 1714-1715, and attorney-general in 1718-1720. He was a good lawyer, a good speaker and debater in the House of Commons, but violent and impracticable in his temper. In 1721 he accepted a peerage and retired to the House of Lords. His tenure of office as attorney-general was marked by an episode which is unprecedented in the course of English legal history. William Thomson [7] had become solicitor-general in 1717. For preparing and passing the charters of the many corporations, which were being floated at this period of speculation, the law officers of the Crown were entitled to certain fees. Thomson thought that his colleague Lechmere was getting too large a share of these fees, and accused him of corruption before a committee of the House of Commons, which had been appointed to inquire into these companies—" alleging that he had not only pocketed large bribes, but had permitted public biddings for charters at his chambers as at an auction." [8] Upon investigation this charge was pronounced to be malicious, false, and scandalous, and Thomson lost his office in 1720. But in spite of this disgraceful episode he kept his seat in Parliament, and his position as recorder of London; and, later, became cursitor baron, and afterwards a judicial baron of the Exchequer—without ceasing to be recorder of London. John Fortescue-Aland (1670-1746) [9] was the ninth in direct lineal descent from the famous Chief

[1] Harvard Legal Essays 161, 173, 204-205.
[2] D.N.B.
[3] For this book see above 349.
[4] D.N.B.; George Duke, A Brief Memoir of Sir Clement Wearg.
[5] Yorke, the attorney-general, took no part on account of his friendship with the accused, above 242.
[6] D.N.B.
[7] Foss, Judges viii 173-176.
[8] Ibid 175; Parlt. Hist. vii 643 *n*.
[9] Foss, Judges viii 98-101; D.N.B.; his father had taken the name of Aland on his marriage with a daughter of Henry Aland of Waterford.

Justice of Henry VI's reign.[1] He was solicitor-general, 1715-1717, baron of the Exchequer, judge of the King's Bench, and of the Common Pleas.[2] Having served as judge for twenty-eight years, he retired in 1746, and was made an Irish peer. He resembled his great ancestor in his literary tastes. He was a fellow of the Royal Society, a D.C.L. of Oxford, edited an edition of Fortescue's *Governance of England*,[3] and wrote a volume of reports which was published after his death.[4]

The contribution made by these lawyers to the development of the common law shows that it was being developed and consolidated along the lines upon which it had begun to develop during the closing years of the preceding century. All the three common law courts took a hand in this process of development and consolidation; but the share taken by the court of King's Bench was the most considerable, partly because its jurisdiction was most extensive, and partly because it had a jurisdiction in error from the court of Common Pleas, so that some of the more important cases there decided were reviewed by it. But though developments were taking place, it must be admitted that the rate of development was slow. The fact that the rate of development was slow was due to two main causes: first, the procedure of all the courts was very technical, encumbered with fictions, and elaborated by a mass of conventional rules and practices;[5] and the rules of pleading were becoming more subtle, more elaborate, and more rigid.[6] Much of the time of the courts was occupied with cases which turned only or principally upon points of procedure or pleading. Secondly, the courts considered it more important to arrive at a correct decision than to save the time and money of the litigants. They never hesitated to listen to repeated arguments—we hear of cases which were argued three[7] and even four times;[8] and there was apparently no limit to the number of counsel who might be employed. We hear of a case in the court of Exchequer in which seven counsel on each side were engaged.[9] For these reasons the common law was tending to become somewhat stereotyped and inexpansive. The characteristics which marked

[1] Vol. ii 566-571.

[2] George II did not renew his appointment as judge of the King's Bench when he succeeded to the throne in 1727, but he was appointed judge of the Common Pleas in 1729.

[3] For this book see vol. ii 570-571.

[4] Vol. vi 553, 562.

[5] Vol. ix 247-262; above 453.

[6] Vol. ix 308-314.

[7] Wollaston v. Walker (1732) 2 Stra. at p. 918; Camplin v. Bullman (1761) Parker 198.

[8] Thornby v. Fleetwood (1720) 1 Stra. at p. 352; Warren v. Consett (1727) 2 Stra. at p. 780.

[9] East India Co. v. Naish (1732) Bun. at p. 321.

the age of Walpole in politics, marked also this period in the history of the common law. During this period it was developing and expanding less rapidly than the system of equity.[1]

But although this period in the history of the common law has serious shortcomings, it ought not to be unreservedly condemned. Just as Walpole's policy of "quieta non movere" did very considerable service to the State in the firm establishment of the Revolution settlement, so the routine work of the courts, though it did not develop the law rapidly, fixed firmly the foundations of that modern common law which had emerged during the earlier part of the seventeenth century, and had been developing after the Restoration and the Revolution. It was the rules and principles which were being firmly established during this static period which were the foundation of a large part of Blackstone's *Commentaries;* for Blackstone began to lecture on English law in 1753,[2] so that he must have composed the first draft of his lectures, upon which the *Commentaries* were founded,[3] before that date. If we look at the authorities which he cites, we can see that much of the law stated in the *Commentaries* represents the law as settled and restated by the cases decided, and by the books written, during this period. In fact the work of the courts in applying and restating and harmonizing the mediæval and modern principles, and in reducing these principles to a fixed system, is reflected in Blackstone's book; and though the merits of the book are, as we shall see, due mainly to the genius of the man,[4] yet something is due to the character of the age in which he began to write it. Though we may criticize that age as inexpansive, and complain that its devotion to technicalities made the working of the machinery of the law slow and expensive, there is another side to the picture. Those same characteristics were due to the determination of the judges to reach and state, so far as they could, absolutely right legal principles; and their insistence upon applying at all costs the logically correct conclusions from their rules of pleading and procedure, made for an accuracy in thought and expression, which gave fixity and coherence to those principles.[5] This was an ideal environment for a man of Blackstone's genius; for it made it possible for him to conceive of English law as a set of very permanent principles, logically correct and coherent, and therefore capable of being stated in a systematic form. It formed a body of material upon which his orderly mind and his literary abilities could work with full effect.

At the beginning of the second half of the century there were signs of changes and developments in many directions. The

[1] Above 260. [2] Above 91; below 705-706. [3] Below 720-721.
[4] Below 723-726. [5] Vol. ix 331-335.

colonies were developing, and industry and commerce were expanding. These developments and expansions were giving rise to new problems, which called for new developments in the law, and a new intellectual approach by the lawyers. It was fortunate for the common law that in 1756 the new Chief Justice of the King's Bench was a man who was not only the greatest lawyer of the century, but also a legal statesman, who was fully cognizant of the need to infuse new ideas into the administration and principles of the common law, if it was to remain adequate to solve the new problems which changing commercial and industrial conditions were setting to it; and it was fortunate for the common law that he held office for almost thirty-two years. Lord Mansfield, because he was familiar with other systems of law besides English law, was able to apply to its principles a criticism which was at once learned and detached. His extensive practice had made him as great an equity as a common lawyer; and he was impressed with the capacity for expansion which equity was showing, and convinced of the need to import some of its principles into the common law. Because he was the Chief Justice of a court which exercised a wider jurisdiction than the other two common law courts, he was able to make his influence felt throughout the whole sphere of common law jurisdiction. Though, as we shall see, he failed to persuade his contemporaries and successors to adopt all his views as to the manner in which it was possible and desirable to develop certain of the branches of English law,[1] and notably his views as to the relations of law and equity,[2] he succeeded in putting the commercial law of England on its modern basis; and, what was equally important, he succeeded in infusing a new spirit into the common law, substantive and adjective, the influence of which was felt outside his own court. We shall see that Blackstone was a friend and an admirer of Mansfield; and that he embodied in his *Commentaries* many of Mansfield's ideas,[3] so that though the *Commentaries* embody many of the principles which had been developed in this static period, they also embody some of those new ideas and some of that new spirit which Mansfield was infusing into the common law. Of Mansfield's career, and of the great work which he and his fellow judges of the court of King's Bench did in developing the common law—a work which makes his tenure of the office of Chief Justice a very distinct and important period in the history of that law—I must now speak.

[1] Below 557-559. [2] Below 585-589. [3] Below 591-594, 723.

Lord Mansfield[1] *and the Puisne Judges of his Court.*

I shall, in the first place, give some account of Mansfield's career and character. In the second place, I shall say something of the puisne judges of his court. In the third place, I shall summarize the contribution made by Mansfield and the court of King's Bench to the development of the common law. Lastly, I shall describe the influence of Mansfield on the future development of the common law.

(1) *Mansfield's career and character.*

William Murray, the future Lord Mansfield, was born at Scone on March 2, 1705. He was the fourth son of the fifth viscount Stormont—an impoverished Scottish peer. He received his earliest education at Perth Grammar School, where he laid the foundations of a sound knowledge of Latin, and was taught to write correctly both in Latin and English. In 1718 he left Perth and Scotland for Westminster School.[2] Probably this course was taken on the advice of his elder brother James. James had been a member of Parliament during the last years of Anne's reign, and was a high Tory and a Jacobite. On the accession of George I he had thrown in his lot with the Pretender, by whom he had been created earl of Dunbar. He may have thought that an education under the influence of his friend Atterbury, who was dean of Westminster and bishop of Rochester, would help to induce his brother to adopt the same political principles as he himself held; and it may have been due to Atterbury's influence that in 1719 William Murray was elected a King's scholar. The election was abundantly justified. Murray showed at school that gift of eloquence for which he was in later life distinguished both in Parliament and at the bar,[3] and he proved to be so good a classic that in 1723 he headed the list of the King's scholars who became scholars of Christ Church. He was as diligent at Oxford as he had been at Westminster; and he cultivated his natural gift of eloquence by an intensive study of Cicero and Demosthenes. His essay on Demosthenes

[1] The best biography and estimate of Mansfield's influence on the law is C. H. S. Fifoot's Lord Mansfield, which was published after this account had been written; John Holliday, Life of Lord Mansfield, is a very inadequate biography, though it gives useful information; Foss, Judges viii 335-348; D.N.B.—useful but not very adequate; Campbell, Lives of the Chief Justices ii 302-584, is one of Lord Campbell's most successful biographies; the only first-hand authority for Mansfield's achievement as a judge are the reports of his decisions in Burrow, Cowper, Douglas, and the Term Reports, and in the prefaces to Burrow; a useful summary of some of his decisions in civil cases is given by W. D. Evans, Decisions of Lord Mansfield; his character as a lawyer is skilfully sketched by Charles Butler, Reminiscences i 120-131.

[2] Campbell, op. cit. ii 307-308, has disproved Holliday's statement that he came to London at the age of three.

[3] Holliday, op. cit. 3.

shows his capacity for writing correct and fluent Latin.[1] His verses on the death of George I gained the prize, although his life-long rival Pitt was one of the competitors.[2]

Though Murray was educated at Westminster and Oxford, and learned to speak English correctly, he never lost all traces of his Scottish accent ; [3] and, as we shall see, his study of Scottish law, necessitated by his retainer in many Scottish appeals, led him to retain a distinctly Scottish outlook on law, and a marked bias in favour of Scottish methods of legal reasoning.[4]

That he would be able to adopt, as he wished, the law as his profession was by no means certain when he went to Oxford. *Res angusta domi* seemed to forbid, and to indicate the church as a profession. Fortunately for him, and for English law, one of his friends at Westminster was the son of the first Lord Foley, who had amassed a fortune by his application of the invention of the process of using coal to smelt iron. Lord Foley was so attracted by Murray that he made it financially possible for him to go to the bar. Murray became a member of Lincoln's Inn, April 23, 1724. After taking his B.A. degree in 1727, he took chambers in Lincoln's Inn [5] and was called to the bar, November 23, 1730. Between the time when he took his degree of B.A. and his call he had laid the foundations of his legal learning. His letters to the Duke of Portland show that he had studied intensively both ancient history and the modern history of his own and foreign nations.[6] He studied Roman law,[7] international law,[8] and Scots law ; [9] and the study of Scots law led him to the Dutch and French authorities upon which the leading writers on that law relied.[10] Nor did he neglect the study of English law. He attended the courts ; and, as we have seen,[11] he belonged to a students' debating society at which the students so carefully got up the cases to be argued, that he said, later in life, that these arguments had been of use to him in his practice at the bar, and even after he had become Chief Justice. He learnt the art of pleading from Denison,[12] who afterwards

[1] It is printed by Holliday, op. cit. 5-8.

[2] Parts of it are printed by Campbell, op. cit. ii 325.

[3] In his admission to Oxford his birthplace is set down as Bath ; Holliday, op. cit. 2 tells us that " Blackstone is said to have mentioned this curious circumstance to the Lord Chief Justice of the King's Bench, while he had the honor to sit with him in that court ; when Lord Mansfield answered, ' that possibly the broad pronunciation of the person, who gave in the description, was the origin of the mistake ' " ; that person was no doubt himself ; for to the end he retained traces of his Scottish pronunciation, see Campbell, op. cit. ii 308.

[4] Below 556-557.

[5] His first chambers were at 1 Old Square, then called Gatehouse Court, Campbell, op. cit. ii 326 n. ; later he removed to 5 King's Bench Walk.

[6] The letters are printed by Holliday, op. cit. 12-23.

[7] Below 467. [8] Below 469-470. [9] Below 466, 556.

[10] Vol. xi 15. [11] Above 86-87. [12] Below 478-479.

became one of his colleagues in the court of King's Bench, and the art of conveyancing from James Booth.[1]

Murray's birth, and his charm of manner which he retained throughout his life,[2] gave him the entrée into the fashionable world; and his intellectual gifts procured him the friendship of Pope, and, through Pope, an introduction to the literary society of the day. Pope helped him to perfect his oratorical gifts, and celebrated his rising fame in several of his poems. One of them [3] was written to sympathize with Murray on the rejection of his suit by the parents of a lady who were dissatisfied with his pecuniary position and prospects, and insisted on marrying her "to a squire of broad acres in a midland county." [4] But he soon consoled himself. In 1738, when he had made his name at the bar, he married Lady Elizabeth Finch—a member of a famous legal family [5]—with whom he lived happily for forty-six years.

His rise at the bar was rapid. In 1733-1734 he appeared in several Scottish appeals,[6] and was, it is said, complimented for his conduct of them by Cowper and Macclesfield.[7] In 1737 he appeared before the House of Lords and House of Commons, as counsel for the city of Edinburgh, against the bill to disenfranchise it as punishment for the Porteous riots.[8] In 1738 he appeared for the merchants who were petitioning the House of Commons on the subject of the Spanish depredations.[9] In that year he was retained in eleven appeals to the House of Lords, and in the years 1739 and 1740 in thirty appeals.[10] Amongst his clients were the old duchess of Marlborough and the duke of Newcastle.[11] It was during these years, when he was rising to the leadership of the bar, that he was making himself one of

[1] Butler, Reminiscences i 122; above 372 n. 7.

[2] "In his seventieth year he moved Boswell to record 'the air and manner which none, who ever saw and heard him, can forget,'" Fifoot, Lord Mansfield 33, citing Boswell, Life of Johnson, March 24, 1775.

[3] An imitation of the Sixth of the first Book of Horace's Epistles; here are a few of Pope's lines:—

> If not so pleased, at council board rejoice
> To see their judgments hang upon thy voice;
> From morn till night, at Senate, Rolls, and Hall,
> Plead much, read more, dine late, or not at all.
> But wherefore all this labour, all this strife,
> For fame, for riches, for a noble wife?
> Shall one whom native learning, birth conspired
> To form, not to admire, but be admired,
> Sigh while his Chloe, blind to wit and worth,
> Weds the rich dulness of some son of earth?

[4] Campbell, op. cit. ii 340.
[5] Vol. v 343-344.
[6] Holliday, op. cit. 28-31; Campbell, op. cit. ii 336-338.
[7] Ibid 338.
[8] Holliday, op. cit. 37-39.
[9] Campbell, op. cit. ii 344-345.
[10] Holliday, op. cit. 40, 41.
[11] Campbell, op. cit. ii 343-344, 345-346.

the greatest lawyers, and quite the most effective advocate of his day.

That he was making himself one of the greatest lawyers of the day is shown by his complete mastery of the principles applicable to the many cases upon all branches of the law which came before him as Chief Justice of the King's Bench. That mastery was only possible to a man of great natural abilities, who had laid a solid foundation in his student days, and had constantly improved it during his years of practice at the bar.[1] It is clear that, as student or practitioner, he had read critically and reflected upon the main authorities for the principles and rules of English law. It is probable that he had read at least some of the Year Books.[2] He could appraise the merits of Littleton and Coke;[3] and, as his judgments as Chief Justice show, he was fully conscious of the merits and demerits of the modern reporters.[4] We shall see that he was historically minded, and had acquired some very correct ideas as to the origins and development of many of the principles and rules of English law.[5] He had a large equity practice, and, as he admitted, had learned the principles of equity by his practice before the most able of masters—Lord Hardwicke.[6] Cases such as *Barbuit's Case*[7] show that he was an international as well as an English lawyer; and his decisions as Chief Justice show that he was able to cite and use French and Dutch writers on commercial and maritime law,[8] to expound the rules of the canon law,[9] and the Roman civil law, and to compare the Roman rules with the rules of English law.[10]

That he was the most effective advocate of the day is the unanimous opinion of his contemporaries. Charles Butler, for

[1] "Nature had endowed him with the most singular powers of comprehension. These, aided by the most extensive reading . . . made him ever capable of illuminating the darkest subjects." "So retentive was his memory, that, at any distance of time, he would repeat any arguments or anecdotes he had heard, with all their combinations of circumstances," Holliday, op. cit. 54.

[2] He said that when he was young few persons would admit that they had not read much of the Year Books, but that at the end of his life few pretended to do more than look at them occasionally for particular cases, Butler, Reminiscences i 126.

[3] Ibid 125. [4] Above 137-138, 154.

[5] Below 521-522, 534, 553; see e.g. his judgments in Bright v. Eynon (1757) 1 Burr. 390; Burgess v. Wheate (1757-1759) 1 Eden at pp. 215-237; R. v. Cowle (1759) 2 Burr. 839; Millar v. Taylor (1769) 4 Burr. at pp. 2395-2407; Hall v. Harding (1769) 4 Burr. 2426; Hamilton v. Davis (1771) 5 Burr. 2732.

[6] Above 254.

[7] (1737) Cases t. Talbot 281; vol. x 372; in Triquet v. Bath (1764) 3 Burr. at p. 1481 he tells us that he was counsel in the case.

[8] Thus in Goss v. Withers (1758) 2 Burr. 683 he cites Voet, Grotius, and Bynkershoek; in Luke v. Lyde (1759) 2 Burr. 882 he cites the Rhodian laws, the Consolato del Mare, the laws of Oleron, Roccius de Navibus et Naulo, Louis XIV's ordinance of 1681; in Robinson v. Bland (1760) 2 Burr. 1077, and in Holman v. Johnson (1775) 1 Cowp. 341 he cites Huber de Conflictu Legum.

[9] See e.g. Martyn v. Hind (1776) 2 Cowp. at pp. 442-446.

[10] See Windham v. Chetwynd (1757) 1 Burr. at pp. 425-430.

instance, notes the effect of his handsome appearance, his eye of fire, his beautiful voice. He spoke slowly, he tells us, sounding every syllable; and though he did not always observe the rules of grammar, and used long sentences with "endless parentheses," yet such was the charm of his voice and action, and such the propriety and force of his expression, that these defects were not noticed.[1] And in his method as an advocate, and later as a judge, he was quite original. Butler says:[2]

> Among his contemporaries he had some superiors in force, some equals in persuasion, but in insinuation, he was without a rival or a second. This was particularly distinguishable in his speeches from the bench. He excelled in the statement of a case; Mr. Burke said of it "that it was of itself worth the argument of any other man." He divested it of all unnecessary circumstances; brought together all that were of importance; placed them in so striking a point of view, and connected them by observations so powerful, but which appeared to arise so naturally from the facts themselves, that frequently the hearer was convinced before his lordship began to argue. When his lordship argued he showed equal ability, but it was a mode of argumentation almost peculiar to himself. His statement of the case carried the hearers to the very train of thought into which he wished them to fall, when they should attend to his reasonings. Through them he accompanied them, leading them insensibly to every observation favourable to the conclusion which he wished them to draw, and diverting every objection to it; but all the time keeping himself concealed; so that the hearers thought they found these conclusions in consequence of the powers and working of their own minds, when, in fact, they were the effect of the most subtle argumentation, and the most rigid dialectic.

At the outset of his career Murray had wisely refused the offer of a seat in the House of Commons.[3] But both his talents and his connections were making it clear that he would be a valuable addition to a ministry. Newcastle, for whom he had appeared in a Chancery suit, appreciated his talents; and his father-in-law, the earl of Winchelsea, who had become first lord of the Admiralty, pressed his claims.[4] In 1742 Sir John Strange, the solicitor-general, resigned, and Murray was appointed to that office and returned to the House of Commons as member for Boroughbridge. He held this office till 1754 when he succeeded Ryder as attorney-general. His appointment as solicitor-general begins a new epoch in his life. The opportunities thus given to him led to the development of his experience and the enhancement of his reputation as a lawyer, and to the discovery that he had abilities almost equally great as a Parliamentary orator and statesman.

As law-officer of the Crown he only failed in one prosecu-

[1] Reminiscences i 123-124.

[2] Ibid 124; cp. Wilson's account of his argument in Chesterfield v. Jansen (1750) 1 Wils. at p. 288, cited Fifoot, Lord Mansfield 37.

[3] Campbell, op. cit. ii 333.

[4] Ibid 346.

tion ; for he acted on the salutary principle that such prosecutions should not be initiated without certainty of success.[1] His closing speech as one of the managers of the impeachment of Lord Lovat increased his reputation as a lawyer and an advocate [2] —he " shone extremely," wrote Horace Walpole.[3] After he had finished his speech Lord Talbot said : [4]

> The abilities of the learned manager who just now spoke, never appeared with greater splendour than at this very hour, when his candour and humanity have been joined to those great abilities which have already made him so conspicuous, that I hope one day to see him add lustre to the dignity of the first civil employment in this nation.

The manner in which he dealt with an objection made by Lord Lovat, which was to some extent countenanced by Lord Talbot, that witnesses brought up against him were not examined for fear that, on cross-examination, they might support Lovat's statement that he had been deprived of his witnesses, and that he ought to be allowed to call witnesses to prove this allegation, was regarded by the court as quite conclusive ; [5] and it even extorted some words of praise from the accused.[6] The remonstrance which he drafted against the high-handed procedure of the King of Prussia, who had withheld the money due to British subjects on account of the Silesian loan, because he objected to the exercise by British cruisers of their right to arrest Prussian ships suspected of carrying contrabrand of war, shows that he was the most learned international lawyer in England.[7] Montesquieu called it a " réponse sans réplique." Lord Campbell says : [8]

> Having been myself employed to write such papers, I may possibly be not unqualified to criticize it, and I must say that I peruse it with a mixed sensation of admiration and despair. The distinctness, the precision, the soundness, the boldness, the caution which characterize his propositions, are beyond all praise ; and he fortifies them by unanswerable arguments and authorities. Preserving diplomatic—nay, even judicial calmness and dignity—he does not leave a tatter of the new neutral code undemolished. . . . It is the great repertory to which our advocates and judges have had recourse when any part of these

[1] Butler, Reminiscences i 125.
[2] 18 S.T. at pp. 802-814.
[3] Letters (Toynbee's ed.) ii 265.
[4] 18 S.T. at p. 814.
[5] Ibid at pp. 814, 822-824.
[6] " I have since suffered by another Mr. Murray, who I must say with pleasure, is an honour to his country, and whose eloquence and learning is much beyond what is to be expressed by an ignorant man like me. I heard him with pleasure, though it was against me. I have the honour to be his relation, though perhaps he neither knows it, nor values it. I wish that his being born in the north may not hinder him from the preferment that his merit and learning deserves. Till that gentleman spoke, your lordships were inclined to grant my earnest request, and allow me further time to bring up witnesses to prove my innocence ; but, it seems, that has been overruled," ibid at p. 827.
[7] It is printed by Holliday, op. cit. 428-447.
[8] Op. cit. ii 377.

dangerous pretensions has been re-advanced. Sir William Scott (Lord Stowell) often quoted it, always spoke of it with reverence, and represented his own decisions . . . as only an expansion of its principles.

The remarkable soundness of his learning upon many topics of English and colonial constitutional law [1] was no doubt due to his experience as a law officer of the Crown.

The number of lawyers who have been equally successful as advocates and as members of the House of Commons is very few. Coke, Bacon, Heneage Finch, Lord Nottingham, amongst Murray's predecessors, Brougham and Cairns amongst his successors, are almost the only examples.[2] Murray at once made his name as one of the two foremost orators in the House of Commons [3]—inferior to Pitt in histrionic power and capacity for rhetoric and invective, but superior in his power of lucid presentation, clear and persuasive reasoning, and accurate knowledge. His speeches as reported in the Parliamentary History are mere summaries of his actual words. We have abstracts of his speeches on such topics as the taking of Hanoverian troops into English pay,[4] on continuing to keep British troops in Flanders,[5] on the connection between the British Crown and the electorate of Hanover,[6] on the question whether the insurance of enemy ships should be permitted,[7] on the treaty of Aix-la-Chapelle,[8] on the Regency Act of 1751,[9] on Hardwicke's Act to abolish the hereditary jurisdictions in Scotland,[10] and on his marriage Act; [11] and they are all clear and convincing statements. But we could not gather from these summaries that his powers of oratory and debate were in any way remarkable. That they were very remarkable is clear from the opinions of those who heard his speeches and witnessed his conflicts with Pitt. "Mr. Pitt and Mr. Murray," wrote Lord Chesterfield,[12]

are beyond comparison the best speakers. . . . They alone can inflame or quiet the House; they alone are so attended to in that numerous and noisy assembly, that you might hear a pin fall while either of them is speaking.

Waldegrave [13] said that Murray was "the ablest man as well as the ablest debater in the House of Commons"; and that

[1] Below 510-513. [2] Campbell, op. cit. ii 562-564.

[3] In 1742 Horace Walpole wrote, "Murray spoke for the first time, with the greatest applause; Pitt answered him with all his force and art of language, but on an ill-founded argument. In all appearance they will be great rivals," Letters (Toynbee's ed.) i 311-312.

[4] Parlt. Hist. xiii 246-257. [5] Ibid 407-415. [6] Ibid 467-471.

[7] Ibid xiv 108-133. [8] Ibid 331-338. [9] Ibid 1033-1039.

[10] Ibid 43 n., citing Walpole's Letter of April 16, 1747.

[11] Ibid xv 74-79—a speech which was praised by Horace Walpole, Letters (Toynbee's ed.) ii 272.

[12] Letters of Chesterfield (ed. 1774) ii 101 (Feb. 11, 1751).

[13] Memoirs 31.

in all debates of consequence he had greatly the advantage over Pitt in point of argument; and, abuse only excepted, was not much less inferior in any part of oratory.[1]

Horace Walpole said that he "convinced the House, and Pitt too, of his superior abilities"; but "that Pitt could only attack, Murray only defend." He considered his abilities to be superior to those of Pitt and Fox, but that "he had too much and too little of the lawyer: he refined too much, and could wrangle too little for a popular assembly."[2] On the other hand, his speech in the House of Lords in 1758 on the Habeas Corpus Bill aroused his enthusiasm:

He spoke for two hours and a half: his voice and manner composed of harmonious solemnity, were the least graces of his speech. I am not averse to own that I never heard so much argument, so much sense, so much oratory united. His deviations into the abstruse minutiæ of the law served but as a foil to the luminous parts of the oration. Perhaps it was the only speech, that, in my time at least, had real effect; that is it convinced many persons.[3]

Murray's rising reputation was regarded by some with jealousy; and the unpopularity of the Scotch, more especially after the rebellion of 1745, and the fact that his elder brother was a Jacobite in the service of the Pretender, gave his enemies an easy handle against him. The accusation that he was a Jacobite had been made in 1746 in a poem called "The Processionade."[4] It was revived in 1753 by a tale told after dinner by Fawcet, the recorder of Newcastle, to the effect that Johnson, the bishop of Gloucester, Stone, the tutor to the future George III, and Murray had frequently in their youth drunk the health of the Pretender at the house of Vernon, a draper in Cheapside, to whom the Vernon family estate had descended. This tale was communicated to Pelham by a foolish peer, Lord Ravensworth, who had been present at the dinner. George II very sensibly treated the story with contempt; but the opponents of the government made the most of it; and Stone insisted on an investigation. The matter was referred to the Privy Council, which reported that there was no foundation for the charge.[5] An unsuccessful attempt was made to revive the matter in the House of Lords, and the matter dropped. But the space given to it by the memoir writers shows that it made no small stir;[6]

[1] Memoirs 53.
[2] Memoirs of George II's Reign i 490.
[3] Ibid ii 301.
[4] Memoirs of the Marquis of Rockingham i 161.
[5] Horace Walpole says that, at the hearing "Stone and Murray took their Bible on their innocence, and the latter made a fine speech into the bargain," Letters (ed. Toynbee) iii 146.
[6] Dodington, Diary 144-148, 152-156; Walpole, Memoirs of George II's Reign i 266-290.

it was used against Murray by Pitt;[1] and, naturally, it was emphasized by Junius.[2]

On the death of Sir John Strange, Murray was offered and wisely refused the Mastership of the Rolls.[3] He continued to be the mainstay of the government in the House of Commons till the sudden death of Ryder, the Chief Justice of the King's Bench. Then he claimed his reward for his fourteen years' services to the government as law officer, and as its principal defender in the House of Commons. Though the most tempting offers were made to him if he would continue to serve the government in these capacities, he refused them all, and demanded the Chief Justiceship of the King's Bench and a peerage. It was not till he threatened that, if he were refused, he would cease to hold any office at all, in other words that he would go into opposition, that the ministry yielded.[4] On November 8, 1756, Murray was created Chief Justice, and a peer with the title of Baron Mansfield. We have seen that his departure from Lincoln's Inn for Serjeant's Inn was marked by a feast, and by a speech in which he took occasion to pronounce an eloquent panygeric on his master in the law—Lord Hardwicke.[5]

Mansfield's steady determination to accept no office but that of Chief Justice of the King's Bench and a peerage is one of the most remarkable episodes in his career. From the first he had put his profession first. He was conscious that it was as a lawyer he was best fitted to succeed; and we have seen that he refused an offer to bring him into Parliament at the outset of his legal career.[6] But the success which he had had in the House of Commons would probably have caused a less clear-sighted man to reconsider his resolve to make the law his career; and, even if he had adhered to his resolve, he might easily have been tempted, especially if he had had, like Mansfield, a leading practice in the court of Chancery, to accept the less permanent

[1] Walpole, Memoirs of George II's Reign i 357-358.

[2] "I always thought it much to your lordship's honour, that in your earlier days, you were but little infected with the prudence of your country. You had some original attachments, which you took every proper opportunity to acknowledge. The liberal spirit of youth prevailed over your native discretion. Your zeal in the cause of an unhappy prince was expressed with the sincerity of wine and some of the solemnities of religion," Letter xli.

[3] See Newcastle's letter to Hardwicke, cited Campbell, op. cit. ii 382.

[4] Walpole, Memoirs of George II's reign ii 67; Campbell, op. cit. ii 386-389; "as Murray was equally the buckler of Newcastle against his ally, Fox, and his antagonist, Pitt, one may conceive how a nature so apt to despond from conscious insufficience was alarmed at this event. No words can paint the distress it occasioned more strongly than what Charles Townshend said to Murray himself on the report of his intended promotion. 'I wish you joy,' said he, 'or rather myself, for you will ruin the Duke of Newcastle by quitting the House of Commons, and the Chancellor by going into the House of Lords,'" Walpole, op. cit. ii 64.

[5] Above 254.

[6] Above 468.

and semi-political office of Lord Chancellor.[1] Many gifted men have not had the capacity, which Mansfield then showed that he possessed, of seeing clearly the field in which they were most competent to excel. It was fortunate for the future history of the common law that he had this capacity, and insisted upon obtaining a position as Chief Justice and a peer, which enabled him to exercise a permanent influence upon its development.

During the closing years of George II's reign, and till the formation of the Grenville administration in 1763, Mansfield remained a member of the ministry. He performed his greatest service to the State when in 1757 he persuaded the King not to put Fox at the head of the government,[2] and so made it possible for Hardwicke to negotiate both the famous coalition between Pitt and Newcastle, and the silencing of Fox by the gift of the enormously lucrative office of paymaster of the forces.[3] At the beginning of the next reign Mansfield sided with Bute. It was partly because he was a member of Bute's government, and partly because he took then and later the unpopular, but technically correct, view of the provinces of judge and jury on prosecutions for libel,[4] that he attracted the attention of Junius, whose letter to him is a false and venomous, but a very able, caricature of his career and character.[5]

Though he ceased to be a member of the ministry in 1763, he continued to be a leading member of the House of Lords. Horace Walpole, describing the debate on the Regency Bill in 1765, said, " the third day was a scene of folly and confusion, for when Lord Mansfield is absent,

> 'Lost is the nation's sense, nor can be found.' "[6]

He opposed the repeal of the Stamp Act in 1766 by arguments which were unanswerable from the purely legalistic standpoint; and he rightly pointed out that a vacillating policy would be fatal.[7] He attacked the illegal embargo on corn in the same year.[8] He opposed a motion of the earl of Chatham, in 1770, condemning the resolution of the House of Commons which incapacitated Wilkes from being a candidate for Middlesex, because, if carried, it would stir up a quarrel between the two Houses.[9] On the other hand, he supported in a very able speech the bill to take

[1] Offers of the Chancellorship were made to him 1756, 1757, and 1770, Campbell, op. cit. ii 446, 450, 469.

[2] See his letter to Hardwicke cited ibid 449-450.

[3] Vol. x 84; above 247-248.

[4] Vol. x 676-680.

[5] Letter xli; see also Letters lix, lxi, lxv, lxviii; the last letter is an elaborate attempt to prove that Mansfield had acted illegally when he bailed Eyre who was accused of felony; as to this Lord Campbell says that Junius " was egregiously in the wrong—clearly showing that he was not a lawyer," op. cit. ii 491.

[6] Letters (ed. Toynbee) vi 221.

[7] Parlt. Hist. xvi 172-177.

[8] Ibid 292 n.

[9] Ibid 959-962, 1302-1303.

away the privilege of not being sued while Parliament was sitting, which was then enjoyed by the servants of peers;[1] and he voted for the bill for the relief of the Roman Catholics in 1778.[2] It was for this reason, and also because he had always been willing to strain the law in their favour,[3] that his house was destroyed by the mob in the Gordon riots, and an irreparable loss was inflicted upon the literature of the law by the destruction of his books and manuscripts.[4] To the end he was in favour of a vigorous prosecution of the war against America,[5] and was perhaps prepared to answer his old rival Chatham when, in 1778, he made his famous last speech in the House of Lords which ended in his collapse on the floor of the House.[6] Though he acted as Speaker of the House of Lords during the short coalition ministry of Fox and North, he had by that time ceased to take much part in politics. His last speech in the House of Lords was made on a bill to prevent bribery at elections, which he opposed mainly on the ground that the existing law was sufficient, and that it was bad policy to multiply statutes unnecessarily.[7] The fact that in 1770 he had almost invited a discussion by the House of Lords on his adminis-

[1] Parlt. Hist. xvi 974-978.

[2] 18 George III c. 60; Parlt. Hist. xix 1143-1145.

[3] At the trial of Webb in 1768 for having said mass, at the suit of Payne a common informer, his direction to the jury was in effect a piece of very skilful advocacy which was successful in securing an acquittal; *inter alia* he told them that it was not the design of the Legislature to have these laws enforced by every common informer, that these laws "were never designed to be enforced at all, but were only made *in terrorem*," and that times had changed since they were passed—"the pope has very little power . . . as for the Jesuits they are now banished out of most of the kingdoms in Europe," Holliday, op. cit. 176, 179.

[4] Cowper wrote:—

> So then—the Vandals of our isle,
> Sworn foes to sense and law,
> Have burnt to dust a nobler pile
> Than ever Roman saw.
>
> And Murray sighs o'er Pope and Swift,
> And many a treasure more,
> The well judg'd purchase and the gift
> That graced his lettered store.
>
> Their pages mangled burnt and torn,
> Their loss was his alone;
> But ages yet to come shall mourn
> The burning of his own.

[5] Parlt. Hist. xviii 279-280, 282-283, 955-958, 1100-1103, 1283.

[6] I think that Lord Campbell, op. cit. 507, successfully defends him from the charge that he showed insensibility on that occasion; though they were life-long political opponents they probably respected one another—Mansfield had made Pitt's triumphant ministry possible in 1757, above 473, and Pitt said of Mansfield that he respected his abilities and learning, that he never lost a word of what he said, and that he considered him the equal of Somers and Holt, Holliday, op. cit. 52-53.

[7] Parlt. Hist. xxiv 766-768.

tration of the law of libel, and had then declined the challenge of Lord Camden to discuss it, shows that he was even then beginning to weary of political strife.[1] In 1776 his services to the law and the State had been rewarded by an earldom; and since he was childless, a special remainder was inserted to his brother's wife and her issue.[2]

In fact, although he shone as a leader in the House of Lords, as he had shone as a leader in the House of Commons,[3] his abiding interest was in the law and its administration. He realized that it was his work as Chief Justice of the King's Bench, and as the leading lawyer in the House of Lords, which would be his titles to permanent fame. To that work, as he got older, he devoted all his time and his talents and his knowledge of the law, which grew more profound and more mature as his experience grew with the passage of the years. It is not surprising that the value of his work was appreciated not only by English lawyers but also by the lawyers of other countries.

Mansfield once said: "I never give a judicial opinion upon any point, until I think I am master of every material argument and authority relative to it."[4] His contemporaries admitted the justice of this claim. "On all occasions," says Butler,[5]

> he was perfectly master of the case before him, and apprised of every principle of law, and every adjudication of the courts, immediately or remotely applicable to it. . . . And it was not only on great occasions that his talents were conspicuous. They were equally discoverable in the common business of the courts. *Par negotiis neque supra* was never more appliable than to the discernment, perseverance, abilities and good humour with which he conducted himself in that part of his office.

[1] Parlt. Hist. xvi 1312-1313, 1317, 1321-1322.

[2] The remainder was framed in this way because it was then thought that a peerage of Great Britain could not be conferred on a Scottish peer, though he could inherit such a peerage from his mother; when in 1782 the House of Lords came to the conclusion that this view of the law was erroneous, a new patent was granted with remainder to his brother—"thus two earldoms of Mansfield were constituted, the latter of which on the death of the first grantee descended upon Viscount Stormont, while the former was taken by the Viscountess, and enjoyed by her in her own right many years after her husband's death," Campbell, op. cit. ii 501-502.

[3] Richard Hurd, bishop of Worcester, Life of Warburton, Warburton's Works i 36 said: "Of his conduct in the House of Lords I can speak with more confidence, because I speak from my own observation. Too good to be the leader, and too able to be the dupe of any party, he was believed to speak his own sense of public measures; and the authority of his judgment was so high that in regular times the House was usually decided by it. . . . All was clear candid reason letting itself so easily into the mind of the hearers as to carry information and conviction with it"; this agrees very well with Butler's estimate of his eloquence as an advocate and a judge, above 468.

[4] R. v. Wilkes (1770) 4 Burr. at p. 2549; in the case of Lee v. Gansel (1774) 1 Cowp. at p. 4 Mansfield adjourned the hearing in order "to look into the cases, and also into some that had not been cited"; in the case of Jones v. Maunsel (1779) 1 Dougl. at p. 305 a new trial was ordered since the law was doubtful and it was desirable to have the point settled "upon a special verdict in the most solemn manner known to the constitution."

[5] Reminiscences i 130-131.

It is true that he sometimes gave offence by reading a paper while counsel was arguing—" but what was the astonishment when he asked in his usual manner ' have you done ? ' and then would go through a long examination, and recapitulate the whole evidence with the strictest accuracy " ; [1] and he was always ready, Buller, J. tells us, to correct an opinion suddenly given at *nisi prius*.[2] Blackstone tells us [3] that his masterly conduct of prize cases " was known and revered by every state in Europe " ; and Park said in his dedication to him of his book on Insurances, that his conduct of commercial cases had made his name " the boast of Britain and the admiration of Europe." Moreover, let us, who are teachers of law, remember that his services to the cause of legal education were by no means inconsiderable. We have seen that it was he who suggested to Blackstone the project of giving lectures on English law at Oxford, and so initiated the train of events which led to the writing of the *Commentaries*.[4] He recognized the merits of the *Commentaries* and the great benefits which they conferred on the students of the law ; [5] when he was Chief Justice, places in his court were reserved for the students ; [6] and he would sometimes take the trouble to state and explain the cases to them.[7]

He continued to preside in his court till 1786 ; [8] but in the Michaelmas term of that year his health prevented him from sitting. He would have liked to have had Buller, J. as his successor ; and would have resigned in his favour. But Pitt disliked Buller,[9] and wished to reward Kenyon. Consequently Mansfield did not resign till 1788, until which time Buller in

[1] J. Craddock, Memoirs iv 155.

[2] Lickbarrow v. Mason (1787) 2 T.R. at p. 74 ; cp. R. v. Mayor of Liverpool (1759) 2 Burr. at p. 730 where Mansfield said " he had no doubt at present : though he would not preclude a further argument, if the parties should not agree to his reasons."

[3] Comm. iii 70. [4] Above 91. [5] Above 418 ; below 716.

[6] Bowring says, Works of Bentham x 45, that Bentham's father " gave the crier of the court seven shillings and sixpence to secure a particular seat during the term. This seat was immediately below the officers under the judges. There were four such seats. There was, in those days, room for two students on each side of the judge on the bench ; but Lord Kenyon put an end to the usage " ; Campbell, who began his studentship in the days of Kenyon, bears this out, and he tells us that there was a student's box at the Guildhall which was close to the judge, and that Kenyon " handed the record to us, and would point out to us the important issues to be tried," op. cit. ii 329 n.

[7] Thus in the case of Wilson v. Mackreth (1766) 3 Burr. at p. 1826 he said, " there wants nothing to answer the objection, but to state the case : which I will do for the sake of the students " ; in the case of R. v. Peters (1758) 1 Burr. at p. 571, before giving judgment he " first desired Mr. Hussey to state the case for the sake of the students " ; in the case of Saunderson v. Rowles (1771) 4 Burr. at p. 2067 he is said to have stated the exact facts very particularly that the bar and the students might know the exact ground of the court's opinion.

[8] He was absent during part of the Easter term 1786, 1 T.R. at p. 184, but he was back again in the following term, ibid at p. 272.

[9] Below 489.

effect took his place. On his resignation he retired to Kenwood, where he spent his remaining years, in full possession of his faculties, improving his estate, reading the classics, and entertaining, with the social charm for which he was famous,[1] his friends old and young. He died March 20, 1793. He was buried in Westminster Abbey, but by his own wish there was no public funeral. The expense of his monument by Flaxman was defrayed by the legacy of a Mr. Baillie—a grateful client for whom he had recovered a large estate.

Mansfield is one of the most remarkable of the many great lawyers who have helped to build up the fabric of modern English law. He is remarkable for his mental qualities, for his profound knowledge of English, Scottish, and foreign law, and for his influence upon the later development of the common law. It is true that his contemporaries and successors did not always agree with his views as to the course which that development should take. It is true that some of his immediate successors—notably Kenyon and Eldon—stressed these points of disagreement, and, consequently, were sometimes too prone to disparage unduly his talents and his achievements.[2] But the lapse of time has enabled us to estimate those talents and that achievement in their true perspective. It has enabled us to see that he exercised a profound influence upon many branches of the common law by his judgments in the large number of cases in which his views were accepted ; [3] that in some of the cases in which his views were rejected, they have had an indirect influence upon the development of the law ; [4] and that in other cases in which they were rejected, they show an astonishing foresight of the course taken by the legislative reforms of the succeeding centuries.[5]

That Mansfield's work was so effective was due, to no small extent, to the fact that he used his gifts as an advocate to convince his colleagues of the correctness of his decisions, and of the reasoning upon which they were based.[6] There were very few cases in which there was a final difference of opinion between them.[7]

[1] " What inexpressible delight was it to participate in the pleasantry and ease of his conversation, in those convivial hours, when true greatness is exhibited to our view without reserve. . . . In private discourse at his table, he would enliven and entertain his guests with the purest attic wit. . . . At one time, curious historical facts engaged their attention ; at another, anecdotes of the most famous men were related by him with engaging ease and uncommon accuracy," Holliday, op. cit. 54.

[2] Campbell, op. cit. ii 394-395, speaks of the effect of this disparagement from his own experience, but, as he says, " these delusions are no more."

[3] Below 559. [4] Below 548-549. [5] Below 559.

[6] On this matter see Butler's remarks cited above 468.

[7] Millar v. Taylor (1769) 4 Burr. 2303 ; Roe v. Harvey (1769) 4 Burr. at p. 2488 ; Perrin v. Blake (1770) 4 Burr. 2579 ; Lowry v. Bourdieu (1780) 2 Dougl. at p. 471 ; Ancher v. Bank of England (1781) 2 Dougl. at p. 640 ; Anthon v. Fisher (1782) 3 Dougl. at p. 177 ; London Assurance Co. v. Sainsbury (1783) 3 Dougl. at p. 249 ; R. v. Shipley (1784) 4 Dougl. at p. 171 ; Jones v. Smart (1785) 1 T.R. at p. 49 ; Yates v. Hall (1785) 1 T.R. at p. 77.

As Burrow said,[1] this unanimity gave "weight and dispatch to the decisions, certainty to the law, and infinite satisfaction to the suitors," with the result that the business of the court enormously increased, although all the other courts were staffed by exceptionally able judges. Mansfield's decisions had the full weight of the authority of the court of King's Bench; and, since his colleagues were all lawyers of great learning, the influence of his decisions was much increased. "The authority of right judgments upon right principles," said Burrow,[2] "given unanimously by magistrates who add weight and dignity to the highest offices, instead of drawing any from them, is so great, that the direct point determined becomes a rule for ever, and establishes certainty, the mother of security and peace."

Of the contribution of Mansfield's colleagues to the development of the law, I must now give some account.

(2) *The puisne judges of the Court of King's Bench.*[3]

When Mansfield became Chief Justice the three puisne judges of his court were Foster, Denison, and Wilmot. I have already given some account of Foster.[4] We have seen that he was the most learned criminal lawyer of his day; and Burrow's reports show that he was learned in other branches of the common law. He had, for instance, some very definite views as to the archaic and inconvenient character of tenure in ancient demesne;[5] and upon the relation of mercantile custom to the common law.[6]

Thomas Denison[7] entered the Inner Temple in 1718. He soon made his name as a good pleader—we have seen that it was in his chambers that Mansfield learned the art of pleading[8]—and a good lawyer. Though he was reluctant to take judicial office, he was prevailed upon to accept, and was appointed a

[1] 4 Burr. at p. 2395 *note*. [2] 1 Burr. Preface iv.

[3] The following is the list of these judges with the dates of their tenure of office as judges of the court: Thomas Denison 1741-1765; Michael Foster 1745-1763; John Eardley Wilmot 1755-1766; Joseph Yates 1764-1770; Richard Aston 1765-1778; James Hewitt 1766-1768; Edward Willes 1768-1787; William Blackstone Feb.-June, 1770; William Henry Ashhurst 1770-1799; Francis Buller 1778-1794; Nash Grose 1787-1813.

[4] Above 135-137.

[5] "He spoke of these courts of ancient demesne, as putting people out of the protection of the law, and fitter to be totally destroyed, than to be favoured and assisted," Rust v. Roe (1760) 2 Burr. at p. 1047; for tenure in ancient demesne see vol. iii 263-269.

[6] "People do not sufficiently distinguish between customs of different sorts. The true distinction is between general customs (which are part of the common law), and local customs (*which* are not so). This custom of the merchants is the general law of the kingdom, part of the common law; and therefore ought not to have been left to the jury, after it had been already settled by judicial determinations," Edie v. East India Company (1761) 2 Burr. at p. 1226; cp. vol. v 144-145; below 527-528.

[7] Foss, Judges viii 266-268. [8] Above 465.

judge of the King's Bench in 1741. He resigned February 14, 1765, and died September 8 in the same year. He had always remained a close friend of Mansfield, who, on his death, "as an office of piety,"[1] wrote his epitaph.[2] In it he emphasizes Denison's mastery of the common law, his aversion to chicane, his desire to do substantial justice, the manner in which he used his legal knowledge to "find the right way of doing what was right," his "religious application of the inflexible rule of law to all questions concerning the power of the Crown, and privileges of the subject." As we might expect from the character of the writer of this epitaph, and his exceptional opportunity of adjudicating upon the character of its subject, there is every reason to think that this praise is substantially true. The reports show that Denison was always ready, if he could,[3] to use his learning to do substantial justice. He laid it down that bye-laws of companies should be construed reasonably and upheld if possible;[4] and he corrected a mistaken impression as to the extent to which an inferior court could set aside the verdict of a jury.[5] In the case of *Edie v. East India Co.*[6] he explained why the holder of a bill of exchange could not, by a restrictive indorsement, destroy its negotiability;[7] and in the case of *Robinson v. Bland* he gave a lucid exposition of the reasons why the rights of the parties upon a foreign bill must, if it was sued upon in England, be determined by English law.[8] In these and other cases he laid down the law with a clarity which is only possible to a man who is a master of legal principles.

John Eardley Wilmot[9] was born August 16, 1709. He was educated at Hunter's School at Lichfield, where no less than four of his contemporary judges had been educated,[10] and where he had Johnson and Garrick as his school-fellows. From there he went to Westminster School and Trinity Hall, Cambridge. At

[1] Holliday, Life of Mansfield 275.

[2] The epitaph is printed by ibid 275-277, and by Foss, Judges viii 267-268.

[3] In the case of Robinson v. Raley (1757) 1 Burr. at p. 322, in which the court gave judgment for the plaintiff upon his demurrers, he said, "we cannot help this: I wish we could: because the merits seem to be with the defendant."

[4] "Bye-laws ought to have a reasonable construction: we ought not to construe them so strictly, as to take them to be void, if every particular reason of making them does not appear," Vintner's Co. v. Passey 1 Burr. at p. 239.

[5] "It seemed to be understood and agreed at the bar that an inferior court could not set aside a verdict at all. . . . He thought that an inferior court may set aside even a verdict for irregularity; though they are not to be trusted with a power of setting aside verdicts upon the merits," R. v. Peters (1758) 1 Burr. at p. 572.

[6] (1761) 2 Burr. 1216.

[7] "I never before heard of this notion of a restrictive assignment of a negotiable bill . . . there is no instance of a restrictive limitation, where a bill is originally made payable to a man or order," 2 Burr. at p. 1224.

[8] (1760) 2 Burr. at pp. 1086-1087.

[9] Foss, Judges viii 403-408; Memoir by his son prefixed to Wilmot's Opinions, D.N.B.

[10] Willes C.J., Parker C.B., Noel J., Lloyd B.

that time he wished to enter the church and become a fellow of his college. But his father insisted on a legal career, and in 1728 he became a member of the Inner Temple, and was called to the bar in 1732. He soon acquired a large practice in the country; and though his London practice was not large, it was sufficient to enable such good judges as Ryder and Hardwicke to appreciate his merits as a lawyer. But he was always unreasonably diffident as to his talents. He refused offers to find him a seat in the House of Commons, he refused a silk gown in 1753, and in 1754 he determined to retire to the country. But soon after his retirement a vacancy occurred in the court of King's Bench, and Wilmot was with some difficulty persuaded by his friends to accept it. He became a judge of the court of King's Bench in 1755; and his ability was so marked that he was made one of the commissioners to whom the Great Seal was entrusted after Hardwicke's resignation in 1756. He was so efficient in this capacity that many thought that he would be appointed Lord Keeper. Probably he would have been appointed if he had not absolutely refused to consider any such proposition.[1] He remained a judge of the court of King's Bench till his appointment as Chief Justice of the Common Pleas in 1766. The most dramatic incident of his career as judge of the court of King's Bench, was the fall of a stack of chimneys through the roof of the hall at Worcester, where he was holding the assizes. Several persons were killed, including the attorney in the case which was being tried, and two of the jury, and many were injured. Wilmot, because he was sitting close to the wall, escaped.[2] He tried, without success, to retire to the post of Chief Justice of Chester in 1765; and it was only the persuasion of his colleague Yates that induced him to accept the post of Chief Justice of the Common Pleas. Unsuccessful attempts were made to induce him to accept the Great Seal on the death of Camden, and again on the death of Yorke. Failing health compelled him to resign his post as Chief Justice in 1771; but till 1782 he still heard Privy Council appeals. He died February 5, 1792.

Both his own reports,[3] and Burrow's reports of his opinions as a judge of the court of King's Bench, show that he was a consummate lawyer. He was learned not only in equity and the common law, but also in the Roman civil law. His opinions

[1] On Nov. 18, 1756, he wrote to his brother: "The acting junior in the Commission is a spectre I started at, but the sustaining the office alone, I must and will refuse at all events. I will not give up the peace of my mind to any earthly consideration whatever. Bread and water are nectar and ambrosia, when contrasted with the supremacy of a court of justice," Wilmot, Memoir 9 n. (*a*).

[2] See his letter narrating the event, printed by Wilmot, op. cit. 10-11.

[3] Above 134-135.

are lucidly expressed, and show that he had mastered all the learning relevant to the case which he was considering. Sometimes they are really eloquent—notably in the case of *Drinkwater v. Royal Exchange Assurance Co.*[1] Good specimens of his powers of lucid and learned reasoning are to be found in his opinion on the Habeas Corpus Bill of 1758,[2] his undelivered judgment in *The King v. Almon*[3] on the power of the court to attach summarily for contempt, his judgment in *Low v. Peers*[4] as to the illegality of contracts in general restraint of marriage. In the case of *Edie v. East India Company* he explained when it was legitimate, and when it was not legitimate, to take the opinion of the merchants as to the existence and contents of a mercantile custom.[5] In another case he used his knowledge of legal history to show "that two different Acts of Parliament had been made, at near 500 years distance, upon the same subject, when there was no occasion for either."[6]

Like Mansfield, he was well aware of the need to keep the law in touch with the social and economic conditions of the day;[7] but he drew the line more skilfully than Mansfield between cases where it was possible for the court to make new law to fit new circumstances, and where it could not.[8] Thus in the case of *Pillans v. Van Mierop*,[9] he gave a lucid summary of the Roman learning as to *nuda pacta*,[10] and the rationale of the doctrine of consideration,[11] the strict rules of which doctrine, he said, had been relaxed of late times;[12] but he refused to commit

[1] (1767) Wilmot, Opinions 282—the question at issue was whether the defendants were liable on a policy containing an exception of damage by fire by any invasion, foreign enemy, or any military or usurped power, when the premises insured had been destroyed as the result of a riot.

[2] Opinions 81-129. [3] Ibid 243-271; vol. iii 394; above 135.

[4] Opinions 364-385.

[5] "The custom of merchants is part of the law of England; and courts of law must take notice of it as such. There may indeed be some questions depending upon customs amongst merchants, where, if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon; yet that is only when the law remains doubtful. And even there, the custom must be proved by facts, not by opinion only; and it must also be subject to the control of law," Edie v. East India Co. (1761) 2 Burr. at p. 1228; below 527, 530.

[6] 13 Edward I St. 1 c. 3, which allowed a wife or a reversioner to intervene to prevent the loss of an estate by default of her husband or the tenant, and 11 George II c. 19 §§ 12 and 13 which allowed the landlord to intervene in actions of ejectment brought against their tenants, Fairclaim v. Shamtitle (1762) 3 Burr. at p. 1301.

[7] Thus he said of the courts of ancient demesne that, "it was a strange wild jurisdiction; where the jurors are judges both of law and of fact, and ignorant country fellows are to determine the nicest points of law," Rust v. Roe (1760) 2 Burr. at p. 1047. [8] Above 477; below 558-559. [9] (1765) 3 Burr. 1663.

[10] At p. 1670. [11] At p. 1671.

[12] "Many of the old cases are strange and absurd: so also are some of the modern ones. . . . It is now settled that when the act is done at the request of the person promising, it will be a sufficient foundation to graft the promise upon. In another instance the strictness has been relaxed; as for instance burying a son; or curing a son; the considerations were both past; and yet holden good. It has been melting down into common sense of late times," at pp. 1671-1672.

himself to the proposition that writing would always validate a contract.[1] He decided the case partly on the ground that there was a consideration,[2] and partly on the ground that it was a commercial case, to which the older rules as to *nuda pacta* did not apply.[3] In the case of *Zouch v. Woolston*[4] Mansfield had committed himself to the dubious proposition that "whatever is an equitable ought to be deemed a legal execution of a power."[5] But Wilmot decided the point at issue—whether a tenant for life could execute a power in part and later completely—on the much narrower ground that the law allowed this;[6] and he expressly admits that the legal and equitable rules as to the execution of powers are not the same:

> After the Statute of Uses, it is much to be lamented that the courts of common law had not adopted all the rules and maxims of courts of equity, by which they were guided in their determinations upon them. This would have prevented the absurdity of the same party's receiving costs in one court, and paying them in another, upon the very same litigation.[7]

These few illustrations of Wilmot's abilities are a sufficient explanation of the reason why judicial promotion was so constantly pressed upon him. They show that he was the ablest of the very able band of the puisne judges which staffed the court of King's Bench during Mansfield's tenure of office.

Joseph Yates[8] was born in 1722. He was educated at Manchester Grammar School and Queen's College, Oxford, and he pursued his legal studies first at Staple Inn and then at the Inner Temple. From 1748 to 1753 he practised as a special pleader. He was called to the bar in 1753, and soon acquired a large practice.[9] In 1764 he succeeded Sir Michael Foster as judge of the court of King's Bench. In 1770 he procured his removal to the court of Common Pleas by getting Blackstone, who was to have been appointed a judge of that court, to take instead his place in the court of King's Bench.[10] It was said by Junius that his removal to the court of Common Pleas was caused by the fact that Mansfield had shown resentment because he had dis-

[1] "I cannot find that a nudum pactum evidenced by writing has been ever holden bad: and I should think it good; though, when it is merely verbal, it is bad; yet I give no opinion of its being good, always, when in writing," at p. 1670.

[2] At p. 1672.

[3] "But to consider this as a commercial case. All nations ought to have their laws conformable to each other in such cases. Fides Servanda est; simplicitas juris gentium praevaleat. Hodierni mores are such, that the old notion about the nudum pactum is not strictly observed as a rule," ibid.

[4] (1760) 2 Burr. 1136. [5] At p. 1147. [6] At p. 1148.

[7] At p. 1147. [8] Foss, Judges viii 409-414; D.N.B.

[9] He had general retainers for the corporation of Liverpool, for Greenwich Hospital, and for the East India Co., Foss, op. cit. viii 410.

[10] Below 706-707.

sented from the opinions of himself and his colleagues.[1] It is true that he had dissented in the two important cases of *Millar v. Taylor*[2] and *Perrin v. Blake*,[3] and that his dissenting judgment in both cases were upheld. It is true that the latter case had caused a somewhat heated controversy,[4] and, in a later case, a denial by Mansfield from the bench that he had given a different opinion when at the bar.[5] But Yates's views in the case of *Millar v. Taylor* were not adopted by the House of Lords till four years after his death,[6] and the reversal of the judgment in the case of *Perrin v. Blake* did not take place till nearly two years after his death.[7] There is little or no evidence that these differences of opinion occasioned any personal feeling; for the unsupported statement of Junius to this effect, written after Yates's death, carries no weight—he was prepared to make any allegation which was damaging to Mansfield.[8] On the other hand, the feeling that he was the only judge who had disturbed the unanimity of the court may have weighed upon the mind of a conscientious man who was in failing health. He died June 7, 1770—four months after he had become a judge of the court of Common Pleas—respected by all, both for his inflexible honesty and for his legal abilities.

His reputation for inflexible honesty was illustrated by what was said in the House of Commons a few months after his death, in a debate on the administration of criminal justice. Alderman Townshend[9] and Colonel Barré[10] alleged, without contradiction, that an unsuccessful attempt had been made by the government to induce him to favour the Crown in certain pending trials, and that he had returned unopened a letter from the King which he had reason to think contained suggestions of this kind. However that may be, the government bore no malice. Lord North, learning that his widow was poorly provided for, gave her a pension of £200 a year.[11] The reports show that his legal abilities were very great. In the case of *Pillans v. Van Mierop* he based his judgment on substantially the same grounds as Wilmot, J.[12] In the case of *Carter v. Murcot*[13] he

[1] "The name of Mr. Justice Yates, will naturally revive in your mind some of those emotions of fear and detestation, with which you always beheld him. That great lawyer, that honest man, saw your whole conduct in the light that I do. After years of ineffectual resistance to the pernicious principles introduced by your Lordship, and uniformly supported by your *humble friends* upon the bench, he determined to quit a court, whose proceedings and decisions he could neither assent to with honour, nor oppose with success," Letter xli.

[2] (1769) 4 Burr. 2303. [3] (1770) Collect. Jurid. i 283. [4] Vol. iii 109.

[5] Hodgson v. Ambrose (1780) 1 Dougl. at pp. 343-344.

[6] Donaldson v. Becket (1774) 4 Burr. 2408. [7] 1 W. Bl. 673 *note*.

[8] Fifoot, Lord Mansfield 47, 175, attaches, I think, too great weight to it; below 707 n. 1.

[9] Parlt. Hist. xvi 1228-1229. [10] Ibid 1295.

[11] Foss, Judges viii 412. [12] (1765) 3 Burr. at pp. 1673-1675; above 481-482.

[13] (1768) 4 Burr. at p. 2164.

gave a lucid exposition as to the presumptions as to the ownership of fishing rights in private rivers and navigable streams. His judgment in the case of *Millar v. Taylor*,[1] which took nearly three hours to deliver,[2] is a magnificent piece of reasoning directed to prove that, after publication, authors had no perpetual copyright at common law, and that the only copyright recognized by law after publication was the limited right conferred by the statute of 1709.[3] It was probably his judgment which was mainly instrumental in persuading the House of Lords in 1774 to take this view.[4] His judgment in the case of *Perrin v. Blake* [5] is a complete answer to the view that, in construing a will, only the intention of the testator must be regarded —" after you have fixed the intention, it then becomes a question, whether such intention can be executed consistently with the established rules of law ".[6] It draws the correct distinction between the manner in which an executory trust and a legal devise must be construed.[7] It points out that, though the original reason for the rule in *Shelley's Case* may be obsolete, it was a rule of law which could only be changed by Parliament ;[8] and that to follow the testator's intention " in contradistinction to the legal sense of his words " would render titles obscure.[9] As Yates's judgment in the case of *Millar v. Taylor* convinced the House of Lords, so his judgment in the case of *Perrin v. Blake* convinced the Exchequer Chamber, and the conveyancers of his own and later times.

Richard Aston,[10] after filling the post of Chief Justice of the Common Pleas in Ireland, became a judge of the court of King's

[1] (1769) 4 Burr. at pp. 2354-2395. [2] 4 Burr. at p. 2354.

[3] Vol. vi 378-379 ; but note that Yates J. did not disagree with Mansfield's view that, before publication, the author had a perpetual copyright, see *In re* Dickens [1935] 1 Ch. at pp. 303-304 *per* Maugham L.J. It should be noted that after the refusal of the House of Commons to renew the licensing Act in 1694, and before the passing of the copyright Act in 1709, petitions to the Crown for an exclusive right to print for fourteen years, were made to the Crown, S.P. Dom. 1703-1704 386 ; and at least one such grant was made, ibid 453 ; these grants continued to be made during the first seventy years of the eighteenth century, Calendar of Home Office Papers, 1760-1765, 16, 123, 242, 366 ; a licence to John Christian Bach, 500, 677 ; ibid 1766-1769, 132, 270, 427, 581 ; ibid 1770-1772, 165, 392, 622. It should be noted that between 1773 and 1775 only one such licence was granted, ibid 1773-1775, 548 ; this was probably due to the fact that the decision in the case of Donaldson v. Becket, which reached the House of Lords in 1774, 4 Burr. 2408 finally held that copyright depended solely on the Act of 1709, vol. vi 378-379.

[4] Donaldson v. Becket (1774) 4 Burr. 2408. In 1773 in Scotland the Court of Session by nine to one came to the same conclusion in the case of Hinton v. Donaldson ; a report of this case was published by Boswell in 1774 who was one of the counsel ; a facsimile reprint of his report was published with notes at Buffalo, N.Y., in 1925 ; it appears from a letter from Dr. Johnson to Strahan, there reproduced, that Dr. Johnson was against perpetual copyright, but that he would have liked to see the period allowed by the Act of Anne extended.

[5] Collect. Jurid. i 309-317. [6] At p. 310.

[7] Ibid. [8] At p. 312. [9] At pp. 311, 317.

[10] Foss, Judges viii 236-238 ; D.N.B.

Bench in 1765, and held this office till his death in 1778. He is said to have been friendly to those he liked, but rather rough in his manners ;[1] and he was accused of having been bribed by a gift of lottery tickets to concur in the decision reversing Wilkes's outlawry. He took no notice of the charge ; and, when upbraided for such conduct, he is said to have replied that he had as good a right to sell his tickets as his brother Willes. That he was a good lawyer his well-reasoned judgment in *Millar v. Taylor*[2] shows. He discusses the question on principle, and parts of his judgment have a distinctly jurisprudential flavour. He agreed with Mansfield that moral obligation was a consideration for a contract ;[3] and Mansfield in the case of *Whitfield v. Lord Le Despencer* expressed his appreciation of his abilities.[4]

James Hewitt[5] is perhaps the least remarkable of the puisne judges of the court during this period. He began as an attorney, became a barrister, and attained the rank of King's serjeant. He was made a judge of the King's Bench, November 6, 1766, but he only held this office for a little over a year. He was made Lord Chancellor of Ireland and an Irish peer with the title of Lord Lifford, on January 9, 1768. He held this post with credit till his death on April 28, 1789.[6] Blackstone was a puisne judge of the court for too short a period to make his influence felt. It was in the court of Common Pleas that he made his judicial career.[7] Of the other puisne judges perhaps the least remarkable was Nash Grose,[8] who was a judge of the court from 1787 to 1813. He was a sound lawyer who, as a general rule, expressed his opinions shortly and clearly—a good example is his short judgment in the case of *Lickbarrow v. Mason.*[9] His judgment in the case of *Farr v. Newman*[10] is the most elaborate of his efforts, in which he succeeded in proving that a testator's goods in the hands of his executor cannot be taken in execution for the executor's own debt. His mind had a strain of legal conservatism, which is illustrated by his dissenting judgments, in the cases of *Pasley v. Freeman*[11] and *Read v. Brookman,*[12] and his statement, in the case of *Leame v. Bray,*[13] of the rule of absolute liability for trespass.

[1] J. Cradock, Memoirs i 85.
[2] (1769) 4 Burr. at pp. 2335-2354.
[3] Trueman v. Fenton (1777) 2 Cowp. at p. 549 ; vol. viii 26-27.
[4] " From the nature and importance of the question, I was desirous of having the opinion of Mr. Justice Aston, whose loss cannot be too much lamented : we had the advantage of his assistance ; for a note of what passed was read over to him, and he was entirely of the same opinion," (1778) 2 Cowp. at p. 763.
[5] Foss, Judges viii 308-310 ; D.N.B.
[6] He was the first Lord Chancellor of Ireland whose judgments have been preserved, D.N.B.
[7] Below 707.
[8] Foss, Judges viii 300-301.
[9] (1787) 2 T.R. at p. 76.
[10] (1792) 4 T.R. at pp. 626-634 ; below 490.
[11] (1789) 3 T.R. at pp. 52-56.
[12] Ibid 161-162 ; vol. vii 347.
[13] (1803) 3 East at p. 600 ; vol. viii 454.

The three remaining puisne judges—Willes, Ashhurst, and more especially Buller—were all men of considerable talents.

Edward Willes [1] was the second son of Chief Justice Willes.[2] He was called to the bar by Lincoln's Inn in 1746 and became solicitor-general in 1766. He was made a judge of the court of King's Bench in 1768, and held this office till his death in 1787. He is said to have been characterized by "a certain flippancy of manner and a neglect of costume"; but his judgments show that he was a sound lawyer with considerable independence of mind. Like his colleagues, he delivered a long and well-reasoned judgment in the case of *Millar v. Taylor;* [3] and his judgment in the case of *Perrin v. Blake* [4] is an able statement of the view which Mansfield favoured. Some of his judgments in commercial cases contain clear statements of principle. One instance is his judgment in the case of *Le Caux v. Eden* [5] in which it was held that an action for false imprisonment would not lie against a person who had taken a ship as prize, although the ship was released; and another is his judgment in the case of *Lockyer v. Offley*,[6] in which he gave a good definition of barratry, and held that, if a ship was insured for a voyage, the underwriter's liability ceased when the ship had been safe in port for twenty-four hours, although an act of barratry on the part of the master, which caused the seizure of the ship by the revenue authority, came to light at a later date. His independence of mind is shown by the fact that he dissented from his brethren on three occasions. The first was on the question whether a policy of insurance was a gaming policy,[7] the second was on the question of the interpretation of the game laws,[8] and the third was on the question of the right of the jury to give a general verdict on a prosecution for libel.[9] Willes and Lord Camden were the only two judges who took the view that the jury had this right.

William Henry Ashhurst [10] was educated at Charterhouse. After his admission at the Inner Temple in 1750, he practised as a special pleader, and had, as one of his pupils, Francis Buller.[11] In 1754 he was called to the bar, and was appointed a judge of the court of King's Bench in 1770. He held this office till 1799, when he resigned. He died, November 5, 1807. The best known episode in his career is his delivery of a charge to the grand jury of Middlesex on November 10, 1792, just after

[1] Foss, Judges viii 401-403.
[2] Above 132.
[3] (1769) 4 Burr. at pp. 2310-2335.
[4] (1770) Collect. Jurid. i 296-304.
[5] (1781) 2 Dougl. at pp. 600-601.
[6] (1786) 1 T.R. at pp. 259-261.
[7] Lowry v. Bourdieu (1780) 2 Dougl. at p. 471.
[8] Jones v. Smart (1785) 1 T.R. at pp. 49-51.
[9] R. v. Shipley (The Dean of St. Asaph) (1784) 4 Dougl. at pp. 171-176; vol. x 676 n. 5.
[10] Foss, Judges viii 234-236; D.N.B.
[11] Below 488-492.

the September massacres in France, on the seditious meetings and corresponding societies which were becoming common in England as the result of the spread of the ideas of the French revolutionaries. In it he attacked these revolutionary doctrines and praised the English system of law and government. This charge was printed and circulated by the Society for Preserving Liberty and Property, which was presided over by Reeves, the historian of English law.[1] It called forth several replies, the most notable of which was written by Bentham in 1792, but was not published till 1823. It is entitled *Truth versus Ashhurst*,[2] and it consists of a detailed examination of four propositions [3] taken from Ashhurst's charge. It contains some acute criticisms of some of the abuses of the court of Chancery, of the relations between law and equity, of the law of settlement, and of the obscurity of the law, law books, and legal documents. It contains also the famous comparison of judge-made law to the law which a man makes for his dog.[4]

Ashhurst was an able lawyer, and his amiable disposition and polished manners made him popular with the bar and the bench. A contemporary critic said of him [5] that he was a man "of liberal education and enlarged notions"; that his language was "pointed and clear"; and that "he reasons logically, and knows how to winnow the chaff and eloquence from argument and law." This description of his legal abilities is borne out by the reports. That he was a sound constitutional lawyer is shown by his judgment in the case of *Macbeath v. Haldimand*,[6] in which he explains shortly and clearly why an officer, contracting on behalf of the government, cannot be made personally liable on the contract. That he was a sound commercial lawyer is shown by his judgments in the case of *Caldwell v. Ball*[7] on the rights of a holder of one of several bills of lading; in the case of *Lickbarrow v. Mason*[8] on the right of stoppage *in transitu*; and in the case of *Lempriere v. Pasley*[9] on the effect of an assignment of goods at sea by an assignor who subsequently committed an act of bankruptcy, and afterwards endorsed the bill of lading to the assignee. His judgments in the case of *Turner*

[1] Above 412-413.

[2] Truth v. Ashhurst; or Law as it is, contrasted with what it is said to be, Works v 231-237.

[3] The four propositions are: I No man is so low as to not to be within the law's protection; II The law of this country only lays such restraints on the actions of individuals as are necessary for the safety and good order of the community at large; III Happily for us, we are not bound by any laws but such as are ordained by the virtual consent of the whole kingdom; IV Happily for us, we are not bound by any laws but such as every man has the means of knowing.

[4] At p. 235, cited above 158.

[5] Cited D.N.B.

[6] (1786) 1 T.R. at pp. 180-181.

[7] Ibid 214-215.

[8] (1787) 2 T.R. at pp. 70-72.

[9] (1788) 2 T.R. at pp. 490-491.

v. Winter [1] on the invalidity of a patent if the specification is ambiguous or misleading, and in the case of *Vernon v. Hankey* [2] on a banker's duty not to pay his customer's cheques after he has had notice that his customer has committed an act of bankruptcy, are able pieces of reasoning. In the case of *Smith v. Milles* [3] he explained the law as to the possession which a plaintiff must prove in order to succeed in an action of trespass; in the case of *Fletcher v. Dyche* [4] he explained the difference between a penalty and liquidated damages; and in the case of *Lord Pelham v. Pickersgill* [5] he explained the law as to tolls traverse and tolls thorough. In the case of *R. v. Stubbs* [6] he held that a woman could be appointed overseer of the poor; and pointed out that there were several offices which women were not disqualified to hold.[7]

With the possible exception of Wilmot,[8] Francis Buller [9] was the most eminent lawyer of all the puisne judges of Mansfield's court. He had legal blood in his veins. One of his ancestors was a daughter of Pollexfen, C.J.,[10] and his mother was a sister of Lord Chancellor Bathurst.[11] He was born in 1746, and entered the Inner Temple in 1763. He learnt the art of special pleading in Ashhurst's chambers, and set up as a pleader in 1765. Like the future Lord Eldon, his industry was stimulated by the fact that he had married early—in 1763. He soon acquired a large practice as a pleader; and his reputation was enhanced by the publication of his work on *Trials at Nisi Prius* in 1767.[12] When he was called to the bar in 1772 he at once acquired a leading practice. The ability with which he conducted his cases attracted the attention of Mansfield; and partly owing to his influence, partly to the influence of his uncle the Lord Chancellor, he was made a judge of the court of King's Bench in 1778 at the early age of thirty-two. He at once made his influence felt; and we have seen that during the last two years of Mansfield's tenure of office he, in effect, filled the place of Chief Justice.[13] Mansfield appreciated the industry and ability which he had shown on the bench; and Buller acknowledged Mansfield as his master in the law, in the famous and often quoted passage, in which he summed up truly and tersely

[1] (1787) 1 T.R. at pp. 605-606.
[2] (1787) 2 T.R. at pp. 118-120.
[3] (1786) 1 T.R. at pp. 480-482.
[4] (1787) 2 T.R. at p. 36.
[5] (1787) 1 T.R. at pp. 667-668.
[6] (1788) 2 T.R. at pp. 405-406.
[7] "There are many instances where, in offices of a higher nature, they are held not to be disqualified; as in the case of the office of High Chamberlain, High Constable, and Marshal; and that of a common constable, which is both an office of trust and likewise, in a degree, judicial. So in the case of the office of sexton," ibid at p. 406.
[8] Above 479-482.
[9] Foss, Judges viii 251-255; Townsend, Twelve Eminent Judges i 1-32; D.N.B.
[10] For Pollexfen see vol. vi 561-562.
[11] Above 313-314
[12] Above 354.
[13] Above 476-477.

Mansfield's achievement in settling the principles of the commercial law of England.[1] It is not surprising, therefore, that Mansfield tried to induce the government to make Buller his successor.[2] But Pitt wished to reward Kenyon for his services in connection with the Westminster election ;[3] and it is said that he was prejudiced against Buller, because he had shown partiality to his relations in a case which he had tried at Bodmin, concerning a pocket borough belonging to a member of his family.[4] Buller continued to act as a judge of the court for six years after Kenyon's appointment. In 1794 ill-health compelled him to move to the " comparative leisure " of the court of Common Pleas.[5] He sat there for another six years. Ill-health compelled him to arrange for his resignation ; but the day after the arrangement had been made (June 5, 1800) and before it was actually effected, he died.

Buller had his faults. His manner was said to have been arrogant, and he was accused of being too hasty in his decisions.[6] On the other hand, he was courteous to the bar, he helped the young and diffident, and among those whom he befriended were Fearne, Hargrave, Gibbs, Law, and Abbott.[7] As a judge in criminal cases he was apt to be too severe. On the other hand, it was said that though no person, if guilty, would choose to be tried by him, every one, if innocent, would prefer him for their judge.[8] It was said that he was very ignorant of every subject except law,[9] and that " his idea of heaven was to sit at *nisi prius* all day and play at whist all night " ;[10] but it is difficult to believe that this is literally true of a man who was so close a personal friend of Mansfield. He seconded Mansfield's attempt to fuse law and equity by giving effect to equitable rights in courts of law,[11] and his view that a moral obligation was a sufficient consideration to support a promise ;[12] so that upon these questions he was, like Mansfield, led into error. On the other hand, he was not a servile disciple of Mansfield. In the cases of *Ancher v. Bank of England*[13] and *Yates v. Hall*[14] he

[1] Lickbarrow v. Mason (1787) 2 T.R. at p. 73, cited vol. i 572 n. 6.
[2] Mansfield's letter to Thurlow on behalf of Buller is cited in G. T. Kenyon's Life of Lord Kenyon 164.
[3] Townsend, Twelve Eminent Judges i 9-10 ; vol. x 119-120.
[4] Campbell, Lives of Chief Justices ii 549-550, iii 36.
[5] See his letter to Kenyon, G. T. Kenyon, Life of Kenyon 254-255.
[6] Foss, Judges viii 254-255 ; J. Cradock, Memoirs iv 150.
[7] Foss, Judges viii 255 ; Abbott had been tutor to his son, and it was due to his advice and help that he entered the legal profession, Townsend, op. cit. i 32.
[8] Ibid 21. [9] Crabb Robinson's Diary ii 160.
[10] Campbell, Lives of the Chief Justices ii 397 n. ; Cradock says, Memoirs iv 151, that his devotion to cards when on circuit exposed him to some censure.
[11] Below 589.
[12] Hawkes v. Saunders (1782) 1 Cowp. at p. 293 ; vol. viii 28.
[13] (1781) 2 Dougl at p. 640. [14] (1785) 1 T.R. at p. 77.

dissented from Mansfield's opinions. He knew sufficient equity to be employed by Thurlow to sit for him in the court of Chancery —though it is said that Thurlow, ungratefully, spoke slightingly of his knowledge ; [1] and he was one of the judges called in to help the Lord Chancellor decide the case of *Thellusson v. Woodford*.[2] But even if his knowledge of equity was not profound, there is no doubt whatever of his abilities as a common lawyer, and more especially as a commercial lawyer. A very cursory glance at a few out of the many important cases which he decided is sufficient to prove this fact.

Some of his decisions show that he was an able exponent of several different branches of the common law. In the case of *Smith v. Dovers* [3] he stated the principle which governed the pleading rule as to when a replication must conclude to the country, and when it must conclude with an averment. His judgment in the case of *Birch v. Wright* [4] is an able disquisition upon certain aspects of the law of landlord and tenant. In the case of *Padget v. Priest* [5] he settled three leading principles of the law relating to executors *de son tort:* first, that though it is for the jury to find the facts, the question whether or not, on those facts, a person is an executor *de son tort*, is a question of law ; secondly, that it is only if an executor *de son tort* has settled with the rightful representative before action brought, that he has a good defence against actions brought against him by creditors ; and, thirdly, that he is entitled, if sued by a rightful representative, to be given credit for payments made in due course of administration. In the case of *Maddon v. White* [6] he laid down the principle that contracts made by an infant, which are for his benefit, such as a lease reserving rent, are valid. In the case of *Farr v. Newman* [7] he delivered a long and learned dissenting judgment, in which he tried to prove that, at law, the goods of a testator in the hands of his executor can be taken in execution on a judgment against the executor for his personal debt. It was, as Lord Kenyon said, " a momentous question " ; [8] and it is remarkable for a curious reversal of the lines of argument usually adopted by Buller and Kenyon. Buller, who was often too ready to decide legal questions on equitable grounds, began by stating the sound principle that

[1] Being asked how Buller had acquired his knowledge of equity, he is said to have replied that " he knows no more of it than a horse," Campbell, Chancellors v 522.

[2] (1798) 4 Ves. 227 ; Buller's judgment is at pp. 319-328.

[3] (1780) 2 Dougl. at p. 430.

[4] (1786) 1 T.R. at pp. 379-388.

[5] (1787) 2 T.R. at pp. 99-100.

[6] Ibid 161.

[7] (1792) 4 T.R. at pp. 634-647.

[8] " A more momentous question never came before the court ; inasmuch as it may respect the property of every man in the kingdom," at p. 647.

before we adopt the doctrines of courts of equity, we must see that we do not act in violation of settled rules of law, and that we have the power of following up the relief given by a court of equity to that extent, which makes their proceedings just and reasonable.[1]

Kenyon, who was opposed to Mansfield's and Buller's bias in favour of taking equitable considerations into account in arriving at decisions upon legal rights,[2] after showing that the law recognized the distinction between property held by an executor in his own right and in his representative capacity, said that he was "not prepared to exclude from his consideration the decisions in courts of equity." [3]

It was upon questions of commercial law that some of Buller's most elaborate judgments were given. In the case of *Le Caux v. Eden* [4] his judgment contains an account of the scope of the prize jurisdiction of the Admiralty, which won the approval of Mansfield,[5] and was the best exposition of the law till Mansfield's more elaborate survey, in the following year, in the case of *Lindo v. Rodney*.[6] In the case of *Tindal v. Brown* [7] he laid down the rule that the question of what is reasonable notice of the dishonour of a bill or note is a question of law. "The numerous cases on this subject," he said,[8] "reflect great discredit on the courts of Westminster. They do infinite mischief in the mercantile world; and this evil can only be remedied . . . by considering the reasonableness of time as a question of law and not of fact." In the case of *Caldwell v. Ball* [9] he gave a useful description of the nature of a bill of lading;[10] and in the case of *Turner v. Winter* [11] he laid it down that though the court ought to help a fair patent, if the specification was ambiguous or misleading "the court ought to look with a very watchful eye to prevent any imposition on the public."[12]

His most important contribution to commercial law was his settlement, in the case of *Lickbarrow v. Mason*, of the rule that though a consignor may stop *in transitu* against a bankrupt consignee, he cannot stop against a person to whom the bill of lading has been *bona fide* assigned by that consignee. That case had a very chequered history. The law was laid down

[1] At p. 637; we shall see, below 596-599, that the fact that a court of law had not got this power was one of the main objections to Mansfield's attempt to give effect to equitable rights in his court.

[2] Below 588-589.

[3] At p. 650.

[4] (1781) 2 Dougl. at pp. 602-613.

[5] 2 Dougl at p. 614.

[6] (1782) 2 Dougl. 613-620.

[7] (1786) 1 T.R. 167.

[8] At p. 169; cp. Bills of Exchange Act 1882 45, 46 Victoria c. 61 § 49 (12).

[9] (1786) 1 T.R. 205.

[10] "It is an acknowledgment under the hand of the captain, that he has received such goods, which he undertakes to deliver to the person named in that bill of lading. It is assignable in its nature; and by indorsement the property is vested in the assignee," at p. 216.

[11] (1787) 1 T.R. 602.

[12] At p. 606.

in this way by the court of King's Bench in 1787.[1] The case was then taken to the Exchequer Chamber on a demurrer to evidence,[2] and this decision was reversed.[3] It was held in substance that a bill of lading, though assignable by indorsement, was not negotiable; and that the indorsement of a bill of lading, being equivalent to an assignment of goods, the assignee could take no better title than the consignee, so that the right to stop *in transitu* must exist against him as well as against his assignor, the consignee.[4] A writ of error was brought in the House of Lords, which in 1793, ordered a new trial on the ground of an informality in the demurrer to evidence.[5] A new trial was held in the court of King's Bench in 1794,[6] and that court adhered to its original decision. But, understanding that the case was to be taken to the House of Lords, it gave no further reasons for its decision.[7] The case was not taken to the House of Lords, and the law as laid down by the court of King's Bench has, ever since, been accepted as correct. It has been accepted as correct, although the judges of the courts of Common Pleas and Exchequer, when consulted by the House of Lords, adhered to the views which they had expressed in the Exchequer Chamber, and said that the right of stoppage *in transitu* could be exercised against the *bona fide* assignee of the bill of lading.[8] I think that it is probable that the very elaborate opinion given by Buller, J., to the House of Lords[9] contributed to this result. It contains an elaborate survey and discussion of all the cases; and though some of the reasoning upon which his opinion is based has been questioned,[10] there is much to be said, on historical grounds, for its validity.[11]

Having now given some account of the personnel of the

[1] 2 T.R. 63. [2] For this proceeding see vol. iii 639 n. 2.

[3] (1790) 1 H. Bl. 357.

[4] "The conclusions which follow for this reasoning . . . are, 1st, that an order to direct the delivery of goods indorsed on a bill of lading, is not equivalent nor even analogous to the assignment of an order to pay money, by the indorsement of a bill of exchange. 2ndly, that the negotiability of bills, and promissory notes, is founded on the custom of merchants, and positive law; but as there is no positive law, neither can any custom of merchants apply to such an instrument as a bill of lading. 3rdly, that it is therefore not negotiable as a bill, but assignable; and passes such right, and no better, as the person assigning had in it," at p. 362 *per* Lord Loughborough.

[5] 5 T.R. 367; it was a cumbrous procedure and Eyre C.J. said in the case of Gibson v. Hunter (1793) 2 H.Bl. at p. 209, that, after the explanation which he had given of the law relating thereto, he was sure that a demurrer to evidence would never again be brought before the House of Lords—in which prophecy he was right, see Sewell v. Burdick (1884) 10 A.C. at p. 99 *per* Lord Blackburn.

[6] 5 T.R. 683. [7] Ibid at p. 686.

[8] 6 East 20 *note;* all the judges of the court of King's Bench adhered to their original opinion.

[9] 6 East 20 *note;* 1 Smith L.C. (10th ed.) 702-719.

[10] Sewell v. Burdick (1884) 10 A.C. at p. 100 *per* Lord Blackburn.

[11] Above 283; below 548 and n. 3.

court of King's Bench during Mansfield's long tenure of office, I must now attempt to give a brief estimate of the contribution which he and the judges of his court have made to the development of the common law.

(3) *The contribution made by Mansfield and the court of King's Bench to the development of the common law.*

A full discussion of the many developments of the common law made by Mansfield and the court of King's Bench belongs more especially to the history of particular legal doctrines. Something has been said of these developments in the land law, and in the law of crime, tort, and contract, in the second Part of the preceding Book of this History; and more will be said of these developments in commercial and maritime law in the second Part of this Book. At this point I shall only indicate briefly the general character of some of these developments under the following heads: Procedure and Pleading; Evidence; Constitutional Law; Criminal Law; The Land Law, Contract, and Tort; Commercial and Maritime Law; Quasi-Contract. In conclusion I shall say something of the effects upon the common law of Mansfield's attempt to give effect in his court to equitable principles and rules.

Procedure and Pleading.

We have seen that, in the eighteenth century, much of the mediæval procedural machinery, and many of the mediæval procedural rules, survived; but that this machinery and these rules had been overlaid by a mass of rules of practice; so that the real working rules of procedure consisted mainly of the conventions of the law courts.[1] We have seen, too, that the growth in the elaboration of the rules of pleading, which had come with the introduction of written pleadings, was producing so logical and technical a system that it often prevented the court from being able to consider the substantial merits of the case,[2] and enabled dishonest litigants to delay or defeat justice. Mansfield realized that a reform of some of these rules of procedure and pleading must be undertaken, if his court was to be made an efficient means of administering justice, and of developing the common law in such a way that it continued to be capable of meeting the new needs of a changing age. Since many of the rules of procedure were under the control of the court, and since it was possible for the court to make new rules, he was able to make some useful changes by direct legislation; and in other cases, something could be done to induce the parties to

[1] Vol. ix 245-247. [2] Ibid 311-314.

consent to adopt a particular course, which made it possible to save expense, and to bring the substantial merits of the case before the court. Something also could be done by discouraging or disallowing a dishonest use of the rules of procedure. It was not of course possible for the court to change the established rules of pleading. But it was possible to prevent these rules from working injustice, sometimes by permitting amendments, sometimes by inducing the parties to adopt a course of action which enabled the court to decide the case upon its merits, sometimes by making a litigant pay costs if he had used the rules of pleading for purposes of chicane, or by penalizing a pleader who had incurred expense and confused the issue by his prolixity. "Boni judicis est ampliare justitiam" [1] was the principle upon which Mansfield and his fellow judges worked. They attempted to give effect to it, first by making new rules of procedure, or by persuading the parties to consent to adopt a course which saved expense and enabled the substantial merits of the case to be tried; secondly, by so moulding the existing rules of procedure that they enabled the court not only to decide the case before the court on its merits, but also to lay down a clear rule for the decision of similar cases; thirdly, by discouraging the dishonest or tricky use of the technicalities of procedure; and fourthly, by endeavouring so to mould and apply the rules of pleading that they did not prevent the court from reaching a decision on the substantial merits of the case.

(i) *Mansfield in some cases made new rules of procedure, and in others induced the parties to adopt a course which saved expense, and enabled the substantial merits of the case to be tried.*

Mansfield signalized his entry upon his office by making a few direct changes in some of the rules of procedure. All enlarged rules to show cause made in one term must be moved before the last week of the succeeding term.[2] In the hearing of motions it had been the custom to begin each day with the senior silk, with the result that junior counsel never got a chance of being heard.[3] Mansfield introduced the practice of "going

[1] "The true test is 'boni judicis est ampliare justitiam'; (not 'jurisdictionen,' as it has often been cited)," R. v. Philips (1757) 1 Burr. at p. 304.

[2] 1 Burr. 9; it appears from 1 Burr. Pref. v that later it was provided that they must be moved in the first week of the succeeding term.

[3] Burrow tells us, 1 Burr. 57, that ever since the time of Holt C.J., "the course had been to begin every day with the senior counsel within the bar, and then to call the next senior in order, and so on, as long as it was convenient for the court to sit; and to proceed again in the same manner upon the next and every subsequent day; although the bar had not been half, or perhaps a quarter gone through upon any one of the former days; so that juniors were very often obliged to attend in vain, without being able to bring on their motions for many successive days. This was the settled and general rule: though perhaps the judges, out of mere compassion to the juniors, would two or three times in a term give them leave to move upon the next day, such motions as were real remnants of the former day."

quite through the bar, even to the youngest counsel, before he would begin again with the seniors." [1] Moreover, for the hearing of important motions, particular days were assigned :

> Whereas they used to take their chance of being moved by counsel in their turn ; and thereby were often kept back till the last day of the term ; and then (for want of time) necessarily put off till the next term, and so on (with good management) from term to term.[2]

The practice of demanding a view had always been a fruitful cause of delay,[3] which had been increased by the construction put upon statutes of 1707 and 1730.[4] "There have been instances," said Mansfield,[5] "of great causes put off for years." He pointed out that the statutes gave the court power to refuse a view if it did not consider such a course necessary. Therefore the court made a rule that, on a motion for a view, the parties were to be heard, and the circumstances of the case were to be examined, to see if a view was necessary, unless the party applying for it would consent to terms which would prevent an unfair use being made of it.[6] In insurance cases the insured must bring an action against all the underwriters.[7] In order to avoid this delay and expense underwriters sometimes applied that all the actions but one should be stayed, undertaking to pay if the plaintiff in the one action succeeded.[8] But plaintiffs did not always consent to this reasonable course.[9] Mansfield pointed out that it was a reasonable course to take, and induced plaintiffs to consent by getting the defendant to undertake not to file a bill in equity for delay, not to bring a writ of error, and to produce material books and papers.[10] "This course," says Park, "was found so beneficial to all parties, that it is now grown into general use ; and is called the Consolidation Rule." [11]

(ii) *Mansfield in many cases so moulded the existing rules of procedure that they enabled the court not only to decide the case before the court on its merits, but also to lay down a clear rule for the decision of similar cases.*

When Mansfield became Chief Justice it was the practice, on the trial of an action, to leave the cases generally to the jury. Since the verdict was general, it was impossible to ascertain the grounds upon which it was decided. If a doubt arose, and a

[1] 1 Burr. 58. [2] 1 Burr. Pref. v. [3] Vol. iii 624.

[4] 4, 5 Anne c. 16 § 8 ; 3 George II c. 25 § 14 ; a notion prevailed, says Burrow, that these statutes made it necessary that "six of the first twelve upon the pannel must view, and appear at the trial ; if they did not, there could be no trial, and the cause must go off" ; this supposed rule was made use of to create delays.

[5] 1 Burr. at p. 254. [6] Ibid.

[7] Park, Marine Insurances, Introd. xli.

[8] Ibid. [9] Ibid. [10] Ibid.

[11] Ibid xli-xlii ; cp. Fifoot, Lord Mansfield 59-60.

case was reserved, the case was heard privately in chambers, and "could never be the rule of decision in any future case." [1] Mansfield introduced three salutary changes. (*a*) In summing up the case to the jury he stated the legal principles applicable to the case, and left the jury to apply those principles to the facts as found by them. Therefore, if a general verdict were given, the grounds on which the jury proceeded, were more easily ascertainable.[2] (*b*) If there was any doubt on a point of law he advised counsel to consent to have a special case stated. These cases were argued in open court, the decision was recorded, and became a precedent for the decision of similar cases.[3] (*c*) Changes were made in the mode in which these special cases were prepared and heard. Formerly counsel drew them up at their leisure, with the result that there was much delay.[4] The procedure introduced by Mansfield was very different. Burrow says : [5]

> When there is a special case or verdict at the sittings, it is dictated by the court, and signed by the counsel before the jury is discharged. If, in settling it, any difference arises about a fact, the opinion of the jury is taken, and the fact is stated accordingly : whereas they used to be left to future settling ; which often occasioned much altercation and many attendances before the judge ; sometimes a new trial to fix a fact ; always a great delay. They must now be set down in the paper for argument within four days ; they must be argued in course as they stand : Altho' both sides should consent, they cannot be put off, but for special and sufficient reasons appearing by affidavit (if necessary), and upon motion a day or two before. Nothing stops on account of the absence of any of the judges : whereas nothing (of this kind) used to come on, unless the court was full.

Mansfield was impressed by the value of decisions on these special cases ; and he always assented to the making of a case if either party wished, though he himself thought the point clear.[6] He valued them because they settled points of law,[7] and thus not only satisfied the parties to a particular case, but

[1] Park, op. cit. xlii. [2] Ibid.
[3] Park, Marine Insurances, Introd. xlii-xliii.
[4] Ibid xliii. [5] 1 Burr. Pref. iv-v.
[6] "I never deny making a case for the opinion of the court, whenever it is asked of me, by the counsel for either party at *nisi prius ;* provided that the case be set down to be argued within four days. But I did and still do think the present case to be a very plain one," Goodtitle v. Paul (1760) 2 Burr. at p. 1093.
[7] "Lord Mansfield said that though he was of the same opinion at the assizes as he was now ; yet he was desirous of having a case made of it, in order to settle the point more deliberately, solemnly, and notoriously, as it was of so extensive a nature," Luke v. Lyde (1759) 2 Burr. at p. 887 ; "I had not a particle of doubt at the trial ; but I desired a case to be made for the opinion of the court, for the sake of that, which perhaps is more important than doing right : to bring all questions upon mercantile transactions to a certainty. General verdicts do not answer the purpose : but when a case is made, the profession know the result, the merchants know the result," Hankey v. Jones (1778) 2 Cowp. at p. 750.

prevented other disputes, " by making the rules of law and the ground upon which they are established certain and notorious." [1]

Mansfield recognized the necessity of the practice of granting new trials. He said : [2]

> There are numberless causes of false verdicts without corruption or bad intention of the jurors. They may have heard too much of the matter before the trial ; and imbibed prejudices without knowing it. The cause may be intricate ; the examination may be so long as to distract and confound their attention. Most general verdicts include legal consequences, as well as propositions of fact : in drawing those consequences, the jury may mistake, and infer directly contrary to law. The parties may be surprised by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer. If unjust verdicts, obtained under these and a thousand like circumstances, were to be conclusive for ever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory.

He pointed out that, upon the argument for the grant of a new trial, the real point of the case emerges, so that " the cause goes down winnowed from the chaff of the first trial " ; [3] and that it gave the judge an opportunity of correcting hasty opinions expressed at *nisi prius*.[4] But Mansfield would never grant a new trial if, as the result of the first trial, substantial justice had been done. Even where a verdict was against the weight of evidence, if the action was trifling and the damages were small, a new trial was refused ; [5] for " a new trial ought to be granted to attain real justice, but not to gratify litigious passions upon every point of summum jus." [6]

Mansfield introduced the practice of deciding cases, as a general rule, after hearing only one argument—whereas, says Burrow : [7]

> I remember three or four to have been common ; and it was not thought proper to refuse hearing a second, third, or even a fourth argument, if *either* side pressed for it, though the court themselves had no doubt."

In one of the first cases which he tried,

> it was expected (as of course) that it would be argued again : but Lord Mansfield gave his opinion immediately to the following effect : Where we have no doubt, we ought not to put the parties to the delay

[1] Luke v. Lyde (1759) 2 Burr. at p. 887.
[2] Bright v. Eynon (1757) 1 Burr. at p. 393.
[3] Hartley v. Buggin (1781) 3 Dougl. at p. 40.
[4] Buller J. said of Mansfield that, " no judge ever sat here more ready than he was to correct an opinion suddenly given at *nisi prius*," Lickbarrow v. Mason (1787) 1 T.R. at p. 74.
[5] Macrow v. Hull (1764) 1 Burr. 11 ; Farewell v. Chaffey (1756) 1 Burr. 54 ; Burton v. Thompson (1758) 2 Burr. 664.
[6] Farewell v. Chaffey (1756) 1 Burr. at p. 54.
[7] 1 Burr. Pref. v.

and expense of a further argument; nor leave other persons who may be interested in the determination of a point so general, unnecessarily under the anxiety of suspense.[1]

If once a case had been set down for argument on a certain day, he would tolerate no delay. When a defendant's counsel applied for an adjournment, saying that he had only had his brief on the preceding evening, the court told him that was his client's fault, and gave judgment for the plaintiff.[2]

Lastly, the court introduced the practice of certifying its opinion on cases sent from the court of Chancery, not privately, but in open court, and of giving the reasons for its opinion.[3] This new practice helped to elucidate many doubtful points of law, more especially questions which turned on the interpretation of deeds and wills relating to land.

(iii) *Mansfield discouraged the dishonest or tricky use of the technicalities of procedure.*

In the first place, he discouraged merely formal objections. When the plaintiff demurred because the defendant had alleged in his declaration that the court had sat on a date which was impossible, because it was out of term, he said :[4]

It is making the practice of the court chicane, and an elusion of justice instead of being a method of coming at right. I wish gentlemen would tell their clients, that objections of this sort ought not and cannot prevail.

On another occasion, when he ordered a formal mistake to be amended, he said that he was "ashamed and grieved that such objections remain."[5] In the second place, he pointed out that it was "very essential to the administration of justice that slips or mistakes of the pen should not be fatal."[6] Therefore he was always ready to amend these slips or mistakes.[7] In

[1] Raynard v. Chase (1756) 1 Burr. at pp. 5-6.

[2] Colebrook v. Dobbs (1762) 3 Burr. 1319—the case had been hanging on ever since Jan. 1757.

[3] In the case of Wright v. Holford (1774) 1 Cowp. at p. 34 Mansfield prefaced his judgment as follows : "I found it a custom, in cases sent by the court of Chancery for our opinion, to certify it privately to the Lord Chancellor in writing, without declaring in this court either the opinion itself, or the reasons upon which it was grounded. But I think the custom wrong, as well as unsatisfactory to the bar : and therefore in the two cases that now await our certificate, and for the future, we shall declare our opinion in this court" ; cp. Fifoot, Lord Mansfield 58, for the manner in which the objections of some of his colleagues to this course were overcome ; Campbell, Chief Justices ii 431 n., says that Kenyon returned to the old practice "because Lord Eldon was disposed to carp and jeer at his reasons" ; Fifoot, op. cit. 231-232.

[4] Hart v. Weston (1770) 5 Burr. at pp. 2588-2589.

[5] Sayer v. Pocock (1776) 1 Cowp. at p. 408 ; cp. Massey v. Rice (1775) 1 Cowp. at p. 349.

[6] R. v. Mayor of Lyme Regis (1779) 1 Dougl. at p. 136.

[7] For his readiness to amend the pleadings see below 502.

the third place, he dealt severely with litigants who made a dishonest use of the rules of procedure. The case of *Anderson v. George* [1] is a good illustration. The facts of that case were as follows: the plaintiff had sold goods to the defendant. The defendant paid for them by giving to the plaintiff a promissory note made by H. and indorsed by himself. The plaintiff demanded the money from H. H. did not pay, and the plaintiff gave him further time to pay on several occasions. Ultimately H. broke. The only dispute between the parties was which of the two ought to bear the loss of H.'s failure. The plaintiff's declaration contained two counts—one for goods sold, the other against the defendant as the indorser of the note. When the case came to be tried the plaintiff, instead of resting his case on the second count, sued on the first and got a verdict. He got a verdict because the defendant, thinking that the only point at issue was which should bear the loss arising from H.'s failure to pay the note, had not given notice to the plaintiff to produce the note. Therefore he could not prove that he had paid for the goods. On a motion for a new trial:

> The court thought the plaintiff had taken an unfair advantage, contrary to justice and good conscience. That the rules of practice must be general: but he who abused them in a particular case, should not shelter a trick, by regularity. The plaintiff did not want notice to produce a note he had in court, and which he had laid in his declaration as a ground of action. Besides he took a verdict for the price of the goods; though he had received satisfaction, the evidence of which was in his own custody and suppressed. They not only set aside the verdict; but set it aside without payment of costs: and declared, the next time that a party should obtain a verdict in like manner, by an unfair unconscionable advantage, without trying the real question, they would set aside the verdict, and make him pay the costs.

(iv) *Mansfield endeavoured so to mould and apply the rules of pleading that they did not prevent the court from reaching a decision on the substantial merits of the case.*

We have seen that Mansfield recognized that the main rules of pleading were sensible and logical.[2] He pointed out that their objects were precision and brevity, and that "nothing is more desirable for the court than precision, nor for the parties than brevity." [3] He held, for instance, that, though it was possible to reject as surplusage immaterial matter incorrectly recited in a pleading, the misrecital of matter which was the actual ground of the action was fatal.[4] Similarly, since it was the object of pleading to produce a clear issue of fact or law, he

[1] (1757) 1 Burr. 352; cp. Johnson v. Houlditch (1758) 1 Burr. 578; Payne v. Rogers (1780) 1 Dougl. 407.
[2] Robinson v. Raley (1757) 1 Burr. at p. 319 cited vol. ix 312.
[3] Bristow v. Wright (1781) 2 Dougl. at p. 667. [4] Ibid.

held that a general averment of performance was bad on demurrer: [1]

> The reason is this; that the question may be brought to some degree of certainty, and notice given of what is to be agitated at the trial. When a particular breach is assigned, there is an affirmative offered on one side, upon which the other may take issue. But here there is a general averment; and no issue is offered by the replication.[2]

That Mansfield was right when he stressed the sensible and logical character of the substantial rules of pleading, can be seen from the fact that many of them have survived the reforms of the nineteenth century, and still exist under other names in the modern system of pleading.[3]

At the same time it was true that many of the rules of pleading were archaic; and that these archaic rules, coupled with the strictness with which they were originally enforced, prevented the court from doing substantial justice. During the eighteenth century, and more especially during Mansfield's tenure of office, great efforts were made to remedy this defect. The reports show that Mansfield told the exact truth when he said:

> The strong bias of my mind has always leaned to prevent the manifest justice of a cause from being defeated or delayed by formal slips which arise from the inadvertence of gentlemen of the profession.[4]

He and his fellow judges used several different expedients to produce this result.

In the first place, they favoured the scrapping of old pleading devices which led to delays which were often fruitless, and they frowned upon the use of technical rules which prevented the court from deciding the case upon its merits. Thus, the award of a repleader [5] was a fruitful source of delay; and it was an useless delay, if it appeared that it was not possible for the defendant to frame a valid defence to the action by any form of pleading. In such a case, therefore, the court refused to award a repleader.[6] In fact, as Denison, J., said,[7] the practice of setting aside a verdict had made such an award less necessary. Similarly, they frowned upon all attempts to use technicalities to obstruct justice. When in an action of trover it was objected that the demand and refusal had occurred after action brought, and it appeared that it had occurred before the writ was issued but after the filing of the bill of Middlesex, because by a legal fiction the bill was dated back to the first day of the term, the

[1] Satyre v. Minns (1777) 2 Cowp. 575.
[2] At p. 578.
[3] Vol. ix 328-329.
[4] Bristow v. Wright (1781) 2 Dougl. at p. 666.
[5] See vol. ix 278.
[6] R. v. Philips (1757) 1 Burr. at pp. 302-303.
[7] Ibid at p. 304.

court was very angry at this attempt to snatch a verdict by a reliance on this fiction. Mansfield said : [1]

> It is true that if there be no special memorandum, the bill, by fiction of law, relates to the first day of the term. But fictions of law hold only in respect of the ends and purposes for which they were invented ; when they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may shew the truth . . . Judges ought to lean against every attempt to non-suit a plaintiff upon objections which have no real relation to the merits. . . . It is unconscionable in a defendant, to take advantage of the apices litigandi, to turn a plaintiff round, and make him pay costs when his demand is just. Against such objections every possible presumption ought to be made which ingenuity can suggest.

Nor did Mansfield hesitate to criticize old rules which he thought were contrary to justice. For instance he criticized the old rule, which was partially remedied by the Act of 1705,[2] confining a defendant to a single plea.[3]

In the second place, the judges favoured all devices which enabled a plaintiff or a defendant to state his case or his defence shortly and clearly, and without the risk of being tripped up by formal objections. Thus they favoured the use of the "common counts" in actions of *indebitatus assumpsit*.[4] Moreover, Mansfield pointed out that, in such an action, the plaintiff

> need not state the special circumstances from which he concludes that, *ex aequo et bono*, the money received by the defendant, ought to be deemed as belonging to him : he may declare generally . . . and make out his case at the trial.[5]

Similarly, the defendant "may go into every equitable defence upon the general issue ; he may claim every equitable allowance ; he may prove a release without pleading it." [6] In another

[1] Morris v. Pugh and Harwood (1761) 2 Burr. at p. 1243.

[2] 4, 5 Anne c. 16 § 4 ; vol. xi 520-521 ; for the reasons why this statute was inadequate see vol. ix 316-317.

[3] "When a man has two conclusive answers, it is contrary to every principle of justice to confine him to one of them alone ; 'tis a rule which never should have been received ; and the Legislature have set it right, by opening the defence, and admitting the defendant to plead several pleas," Wright v. Fawcett (1767) 4 Burr. at p. 2044.

[4] "Simple contracts, express or implied, resulting in mere debts, are of so frequent occurrence as causes of action, that certain concise forms of counts have been devised for suing upon them, in which it is sufficient to state the cause of action by a general description, reserving the particular circumstances of the debt to be given in evidence. . . . These counts which have from time to time been rendered more and more concise, are designated . . . by the terms *indebitatus counts*, *money counts*, or *common counts ;* the expression *common counts* . . . being often used to designate those of most frequent occurrence, viz. where the debt is for goods sold and delivered, goods bargained and sold, work done, money lent, money paid, money received, interest, and upon accounts stated," Bullen and Leake, Precedents of Pleading (3rd ed.) 35 ; for the view held by Mansfield as to the scope of this action, and the manner in which he used it to develop the law of quasi-contract see vol. viii 97 ; below 542-547.

[5] Moses v. Macferlan (1760) 2 Burr. at p. 1010.

[6] Ibid.

case he pointed out that, in actions on the case, as contrasted with actions of trespass and older forms of action, there was no need to plead special defences, but any defence could be given in evidence.[1] So, too, where an action on the case was brought on a policy of insurance for a total loss, he held that a partial loss could be recovered.[2] It is, he said,[3] "a liberal action, and a plaintiff may recover less than the grounds of his declaration support, but not more"; and if the law were otherwise the pleadings would be lengthened by the insertion of unnecessary counts in declarations.[4]

In the third place, the court was liberal in allowing amendments to pleadings, which would enable the case to be tried on its merits. To a large extent, as Mansfield explained in the case of *R. v. Wilkes*,[5] the rules as to when amendments in criminal cases were possible was a matter which depended upon the practice of the offices of the courts.[6] But in civil cases it was largely a matter of judicial discretion. Mansfield favoured liberality in permitting amendments;[7] and the practice of not entering the paper pleadings on the roll till the case was finished,[8] made it possible to permit an amendment at any time during the hearing of the case—"the rule is," said Mansfield,[9] "that whilst all is in paper you may amend."

Lastly, the court disapproved of unnecessary prolixity in pleadings. In an action of covenant on a mortgage deed the pleader had inserted practically the whole of the mortgage deed in the declaration. Mansfield said that such a declaration was

[1] "Another essential difference between those cases upon torts and actions upon the case, is, that those are actions *stricti juris*; and therefore such a former recovery, release, or satisfaction cannot be given in evidence, but must be pleaded: but an action upon the case is founded upon the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and, in effect, is so; and therefore such a former recovery, release, or satisfaction need not be pleaded, but may be given in evidence," Bird v. Randall (1762) 3 Burr. at p. 1353.

[2] Gardiner v. Croasdale (1760) 2 Burr. 904. [3] At p. 906.

[4] "If the present objection was to prevail, it would introduce the addition of unnecessary counts in declarations, and an enormous swelling of the records of the Court. It is more convenient to lay the case short than prolix," at p. 907.

[5] (1770) 4 Burr. 2527.

[6] "Matters of practice," Mansfield observed, "are not to be known from books. What passes at a judge's chambers is matter of tradition: it rests in memory. In cases of this kind judges must enquire of their officers. This is done in court every day when the matter is disputed or doubted. . . . The making this order for amendment appeared to him to be right, and to be a matter of course. It came to him as a matter of course, and recommended as such from a gentleman of great experience, who (he knew) would as soon have cut off his right hand, as have deceived him by representing this as a thing of course, when it was not so," at p. 2566.

[7] "He observed that the court had not used the same strictness of late years, with regard to amendments, as they formerly did: and he said it was much better for the parties that they should not," Alder v. Chip (1759) 2 Burr. at p. 756; cp. Rowland v. Veale (1774) 1 Cowp. at p. 19.

[8] Vol. iii 644-645, 652-653.

[9] Bonfield v. Milner (1760) 2 Burr. at p. 1099.

"a disgrace to the profession and the court." [1] It was pointed out by some of the special pleaders in court that this prolixity was "not only unnecessary, but very dangerous, by being liable to variances and formal objections." The court then gave a ruling as to how a declaration in such an action ought to be drawn; and

> Lord Mansfield desired the bar to take a note of this, and waited till several gentlemen made a memorandum; and gave notice, that the court would animadvert upon any future instance of putting parties to the enormous expense of setting out deeds at length, or superfluous parts of them.[2]

In another case he said that if a pleader had unnecessarily set out a public Act of Parliament in his pleading "he would hold him to half a letter." [3]

Mansfield's efforts to reform some of the rules of procedure and pleading, in order to expedite the business of the court, and to enable it to do substantial justice, had a large measure of success. At the end of the Hilary Term, 1757, Burrow tells us that "the court was not up till near an hour after midnight; though many rules were enlarged, and many long motions adjourned over till next term." [4] On May 20, 1776, he could say that, notwithstanding the immense mass of cases which came before the court, all the business had, with trifling exceptions due to special circumstances, been disposed of [5]—"and one might speak to the same effect, concerning the last day of any former term, for some years backward." [6] Mansfield maintained this standard of efficiency throughout his tenure of office. Erskine told Campbell that

> in Lord Mansfield's time, although the King's Bench monopolized all the common law business, the court often rose at one or two o'clock—the *papers*, special, crown, and peremptory, being cleared; and then I refresh myself by a drive to my villa at Hampstead.[7]

[1] Dundass v. Lord Weymouth (1777) 2 Cowp. 665.

[2] Ibid; cp. Gates v. Carlisle (1761) 1 W.Bl. 270, cited Fifoot, Lord Mansfield 65-66; in Price v. Fletcher (1778) 2 Cowp. 727 a declaration was referred to the master to strike out superfluous matter, "and Lord Mansfield said, the next instance of the kind that came before the court, he would enquire who drew the declaration."

[3] Boyce v. Whitaker (1779) 1 Dougl. at p. 97.

[4] 1 Burr. 252.

[5] "Notwithstanding this immensity of business, it is notorious, that in consequence of method and a few rules which have been laid down to prevent delay (even when the parties themselves would willingly consent to it) nothing now hangs in court. Upon the last day of the very last term, if we exclude such motions of the term as by the desire of the parties went over of course, as peremptories, there was not a single matter of any kind that remained undetermined, excepting one case relating to the proprietary lordship of Maryland, which was professedly postponed on account of the present situation of America," 4 Burr. at pp. 2583-2584.

[6] Ibid at p. 2584.

[7] Lives of the Chief Justices ii 565 *note*.

Evidence.

During the eighteenth century the law of evidence was developing slowly along the lines which had been marked out at the end of the preceding century.[1] It developed slowly, because most of the rulings upon evidence were made at *nisi prius*, and were not reported. It was not till the following period, when reports of *nisi prius* cases began to be published, that a rapid development began to take place.[2] No doubt counsel made notes of these rulings at *nisi prius*. But probably they were not very carefully taken; and it was for this reason that Mansfield could say that

> the uncertainty of the law of evidence is owing to mistaken notes, which have turned particular cases into general rules. Now the whole of the law of evidence consists in applying general rules to particular cases, for almost all evidence is admissible or inadmissible according to the circumstances of the particular case. In perjury . . . I doubt whether the copy of an affidavit would be evidence, because the handwriting is an essential part of the case to prove the identity. . . . But it does not follow . . . that the copy of an affidavit cannot in any case be received in evidence.[3]

Nevertheless, on special cases reserved for the court, and on motions for new trials, many questions which turned on the application of the principles and rules of the law of evidence were emerging; and, as the result of the decisions in these cases, these principles and rules were becoming more precise and detailed. A glance at one or two of the decisions of Mansfield and his colleagues will show that they materially contributed to this result.

One of the most important developments made by Mansfield was the importation into the common law of the equitable doctrine of estoppel by conduct. We have seen that he applied this doctrine in 1762 in the case of *Montefiori v. Montefiori*;[4] and the cases of *Stone v. Freeland*[5] and *Russel v. Longstaffe*[6] show that he was prepared to apply it to the acceptor of a bill of exchange and to the indorser of a promissory note. It was settled, however, in 1787 that there could be no estoppel by deed, just as there could be no estoppel by matter of record,[7] if such an estoppel would result in the doing of an illegal act;[8] and obviously the same principle must be applied to estoppel

[1] Vol. ix 127-222.
[2] Ibid 222; Wigmore, Survey of the History of the Rules of Evidence, Essays A.A.L.H. ii 696.
[3] R. v. Inhabitants of Bagworth (1782) 3 Dougl. at p. 77.
[4] (1762) 1 W. Bl. 363; vol. ix 161-162; cp. Walton v. Shelley (1786) 1 T.R. at p. 300.
[5] (1769) cited in Collins v. Emett (1790) 1 H. Bl. at p. 316.
[6] (1780) 2 Dougl. 514.
[7] Vol. ix 152 and n. 11.
[8] Fairtitle v. Gilbert (1787) 2 T.R. at p. 171 *per* Ashhurst J.

by conduct.[1] Blackstone would have liked to see other equitable additions to the law of evidence imported into the common law. He would have liked to give the common law courts power to order discovery by the oath of the parties, to order the parties to produce books and papers, and to examine witnesses abroad, or witnesses who were aged or who were about to go abroad.[2] Though Mansfield was very willing to import equitable rules into the common law, he never suggested that it was possible to import these rules. But we have seen that, in the course of the eighteenth century, the rule that if a deed was pleaded a profert must be made of it in pleading was relaxed in order to save the parties the expense of an application to a court of equity ; [3] and that this had some effect upon the development of the doctrine of the presumption of a lost modern grant.[4]

The nature and variety of the presumptions recognized by the law were considered in several cases. In the case of *Goodtitle v. Duke of Chandos* [5] Mansfield distinguished between two sorts of presumptions "one a presumption of law not to be contradicted ; the other a species of evidence." [6] The former is in effect a rule of law : the latter only is a part of the law of evidence. Then Mansfield went on to point out that, in order that a presumption may arise, "it must have a ground to stand on." [7] Thus, "where a person has power to suffer a recovery and thereby bar the estate tail, *omnia praesumunter rite et solemniter acta*, until the contrary appears" ; [8] but if, as in this case, there was no proof that there was any intention to affect the land in question by the recovery, there was no ground upon which to found a presumption that there had been a surrender of a life estate, without which the recovery was inoperative.[9] In the case of the *Mayor of Hull v. Horner* [10] it was held that, after an enjoyment of port dues for three hundred and fifty years, a charter granting them could be presumed :

> If a foundation can be laid that a record or deed existed, and was afterwards lost, it may be supplied by the next best evidence to be had, or, if it cannot be shewn that it ever existed, yet enjoyment under a

[1] See British Mutual Banking Co. v. Charnwood Railway Co. (1887) 18 Q.B.D. at p. 719 *per* Fry L.J.

[2] Comm. iii 381-383 ; "it seems," he said, "the height of judicial absurdity, that in the same cause, between the same parties, in the examination of the same facts, a discovery by the oath of the parties should be permitted on one side of Westminster Hall, and denied on the other ; or that the judges of one and the same court should be bound by law to reject such a species of evidence, if attested on a trial at bar, but, when sitting the next day as a court of equity, should be obliged to hear such examination read, and to found their decrees upon it" ; for Blackstone's views as to the relations of law and equity see below 593-594.

[3] Vol. vii 347. [4] Ibid 347-348. [5] (1760) 2 Burr. 1065.
[6] At p. 1072. [7] Ibid. [8] At p. 1073.
[9] At pp. 1073-1074. [10] (1774) 1 Cowp. 102.

title which can only be by record, is strong evidence to be left to a jury that it did once exist.[1]

Similarly, though there was then no statute of limitations which barred a debt on a bond, if it could be shown that no interest has been paid for sixteen years, the jury might presume that the debt was discharged.[2] On the same principle uninterrupted enjoyment of an easement gave rise to a presumption of a right to it;[3] and proof that a person had not been heard of for many years gave rise to a presumption of his death.[4]

The rules as to how certain matters must be proved were growing more precise. Mansfield adhered to the old rule that a subscribing witness must be produced to prove a deed; but he did not approve of it; and if the subscribing witness denied the deed, he allowed other witnesses to be called to prove it.[5] If the witness could not be produced, he held that proof of the handwriting of the person liable was sufficient.[6] The handwriting of a person could be proved by the testimony of witnesses who had seen him write.[7] As to certain matters, circumstantial evidence was sufficient. In the case of *Goodright v. Moss* Mansfield said:[8]

> Circumstances may be proved: for instance, suppose from the hour of one child's birth to the death of its parents, it had always been treated as illegitimate, and another introduced and treated as the heir of the family; that would be good evidence. An entry in a father's family bible, an inscription on a tombstone, a pedigree hung up in the family mansion (as the Duke of Buckingham's was) are all good evidence. So the declarations of parents in their lifetime. I have known advice given to a father and mother to make attested declarations in writing under their hand of the precise time of the birth of the bastard eigne and the subsequent marriage, to prevent controversy in the family touching the inheritance.

On the other hand, parents were not allowed to offer evidence to show that a child born during the marriage was illegitimate.[9]

Mansfield restated and emphasized some of the established

[1] At p. 109. [2] Ibid.

[3] Darwin v. Upton (1786) 2 Wm. Saunders 175 n. (2) to the case of Yard v. Ford; vol. vii 348.

[4] Rowe v. Hasland (1763) 1 W. Bl. 404.

[5] "To be sure this is a captious objection; but it is a technical rule that the subscribing witness must be produced, and it cannot be dispensed with, unless it appear that his attendance cannot be procured. It was doubted, formerly, whether if the subscribing witness denies the deed, you can call other witnesses to prove it; but it was determined by Sir Joseph Jekyll . . . that in such case, other witnesses may be examined; and it has often been done since," Abbott v. Plumbe (1779) 1 Dougl. 216; but he refused to allow the subscribing witness to give evidence to invalidate the deed, since he regarded him as being estopped from doing so, Walton v. Shelley (1786) 1 T.R. at p. 300; vol. ix 208 n. 5.

[6] Coghlan v. Williamson (1779) 1 Dougl. 93.

[7] R. v. Hensey (1758) 1 Burr. at p. 644.

[8] (1777) 2 Cowp. at p. 594. [9] Ibid.

rules of the law of evidence. He restated the rule that opinion was, generally, not admissible as evidence;[1] and he also restated the principal exception to that rule, which admitted the opinion of experts upon scientific matters, and matters involving special knowledge. He said:[2]

> In matters of science no other witnesses can be called. An instance frequently occurs in actions for unskilfully navigating ships. The question then depends on the evidence of those who understand such matters; and when such questions come before me, I always send for some of the brethren of the Trinity House. . . . Handwriting is proved every day by opinion.[3]

The rule excluding hearsay was well established.[4] But some of the exceptions to that rule were beginning to emerge. Thus the cases in which declarations made by deceased persons were admissible in evidence were beginning to accumulate. There are decisions as to the admissibility of declarations as to the cause of the declarant's death,[5] of a declaration by a deceased person that he had forged a will,[6] of declarations as to matters of pedigree,[7] or as to the tenure of land opposed to the tenant's interest.[8] The rule that parol evidence is not admissible to annul or vary the contents of a written document, but that it is admissible to prove facts which render that document void or voidable,[9] was concisely stated by Mansfield in the case of *Pole v. Horrobin:*

> The doctrine is simply this: you shall not by parol evidence impeach the written agreement on account of the danger of perjury. But when the agreement is admitted, you may show other circumstances which make it illegal, but do not contradict the bond.[10]

But in order to arrive at the right interpretation of a document evidence as to the knowledge and circumstances of its author,[11]

[1] "Great stress was laid upon the opinion of the broker. But we all think the jury ought not to pay the least regard to it. It is mere opinion; which is not evidence. . . . It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause; and therefore it is improper and irrelevant in the mouth of a witness," Carter v. Boehm (1766) 3 Burr. at p. 1918; vol. ix 211-212.

[2] Folkes v. Chadd (1782) 3 Dougl. at p. 159; vol. ix 212.

[3] As to the proof of handwriting by opinion see ibid 213-214.

[4] Ibid 214-219.

[5] Wright v. Littler (1761) 3 Burr. at pp. 1252, 1255.

[6] Ibid at p. 1255.

[7] Goodright v. Moss (1777) 2 Cowp. at p. 594.

[8] Davis v. Pierce (1787) 2 T.R. at p. 55 *per* Buller J.

[9] Vol. ix 175-177, 220.

[10] (1782) 3 Dougl. at p. 95.

[11] Cole v. Rawlinson (1702) 1 Salk. 234, cited vol. ix 220; courts of equity in the eighteenth century went further in this direction than courts of law—sometimes too far, Thayer, Evidence 429, 431, 434; cp. Goodinge v. Goodinge (1749) 1 Ves. Sen. at pp. 231-232 where Lord Hardwicke lays down the correct rule. Mansfield considered that the rules of law and equity on such questions of interpretation should be the same, see Doe v. Laming (1760) 2 Burr. at p. 1108; and cp. Evans v. Astley (1765) 1 W. Bl. at p. 521.

and usages which give a particular meaning to the terms used,[1] is admissible.

There were several important decisions upon the various qualifications and disqualifications of witnesses. In the case of *Omychund v. Barker*,[2] which Mansfield had argued when he was solicitor-general,[3] it was decided that non-Christians were admissible as witnesses, and could be sworn according to the form which was binding upon their consciences. In the case of *Atcheson v. Everitt*[4] Mansfield held, in an eloquent and learned judgment, that the disability of a Quaker to affirm in a criminal cause, did not prevent him from affirming in a penal action for debt. The exception of criminal causes from the general permission to affirm given by the Legislation in 1696,[5] offended Mansfield's ideas of toleration. It was, he said,[6]

> an exception not to be extended by equity. In remedial cases, the construction of statutes is extended to other cases within the reason or the rule of them. But when it is a hard positive law, and the reason is not very plainly to be seen, it ought not to be extended by construction.

He then proceeded to demonstrate that a penal action had always been regarded as a civil action—"as much as an action for money had and received."[7] In the case of *R. v. Cliviger*[8] the rule that a husband or wife could not give evidence which might tend to expose the other to a criminal charge was reiterated and enforced; and it was pointed out that the objection was

> not confined merely to cases when the husband and wife are directly accused of any crime; but even in collateral cases if their evidence tends that way, it shall not be admitted.[9]

The rule that witnesses who were interested in the result of the litigation were incompetent, had given rise to difficult questions and inconsistent decisions.[10] These questions had arisen both with respect to witnesses to wills, and witnesses summoned to give evidence as to the facts in issue in an action. In the case of witnesses to wills it was settled in the case of *Windham v. Chetwynd*[11] that it was only an interest at the time of death which was material, and not an interest at the time of attesting the will. In the case of witnesses summoned to give

[1] Lilly v. Ewer (1779) 1 Dougl. 72.
[2] (1744) 1 Atk. p. 21; above 256.
[3] At pp. 30-35.
[4] (1775) 1 Cowp. 382.
[5] 7, 8 William III c. 34 § 6.
[6] 1 Cowp. at p. 391.
[7] Ibid.
[8] (1788) 2 T.R. 263.
[9] At p. 268 *per* Ashhurst J.
[10] "As to the question of interest, it is much to be lamented that there is such confusion in the cases," Walton v. Shelley (1786) 1 T.R. at p. 302 *per* Buller J.
[11] (1757) 1 Burr. 414 at pp. 422-423.

evidence as to the facts in issue in an action, the tendency was "to let the objection go to the credit rather than to the competency of the witness"; [1] and it was settled, shortly after this period, that an interest to incapacitate must be an interest in the event of the case before the court.[2] As Mansfield pointed out, "the disability of a witness from interest was very different from a positive incapacity." The disability of a witness from interest depended upon a presumption of bias, and upon the presumption of the expediency of excluding partial testimony. But it was always possible to rebut these presumptions—for instance by showing that the interest had ceased, or by showing that it was expedient in particular cases to admit the evidence. The result was that there were numerous exceptions to the general rule.[3] It followed that it was difficult to say whether or not it applied in individual cases. Mansfield's statement, that in doubtful cases the bias of the court was to let the objection go to the credit rather than to the competency of the witness,[4] shows that some lawyers were ready to admit the truth of Bentham's argument that this was, in all cases, the right course to pursue; [5] and that therefore incompetence on account of interest should be abolished.

These illustrations are sufficient to show that the law of evidence was growing in elaboration and precision by the application of existing principles and rules to concrete cases. The leading principles and rules were being developed, and exceptions to some of them were beginning to emerge. Burke, misled by the over simplification of the law in some of the books on evidence, which had resulted from the manner in which they had dealt with the rule that the best evidence that the nature of the case will admit must be produced,[6] had ridiculed the scantiness and the abstract character of these rules.[7] But Burke was then speaking as an advocate; and a little later he showed that these rules were, under the pressure of social, political, and commercial necessities, being relaxed in many directions.[8] It was the growth

[1] Walton v. Shelley (1786) 1 T.R. at p. 300; cp. Abraham v. Bunn (1768) 4 Burr. at p. 2255; with this view Lord Hardwicke agreed, R. v. Bray (1737) cas. t. Hard. at p. 360.

[2] Bent v. Baker (1789) 3 T.R. at pp. 32-33 *per* Lord Kenyon C.J.

[3] See Windham v. Chetwynd (1757) 1 Burr. at p. 422 *per* Lord Mansfield C.J.

[4] Above n. 1. [5] Vol. ix 196 and n. 7.

[6] Wigmore, Essays A.A.L.H. ii 695.

[7] "As to the rules of law and evidence, he did not know what they meant; . . . It was true something had been written on the law of evidence, but very general, very abstract, and comprised in so small a compass that a parrot he had known might get them by rote in one half hour, and repeat them in five minutes. These rules such as they were might serve for rules to the courts below, but were not to shackle the House of Commons nor that High Court," History of the Trial of Warren Hastings Pt. V 84, Feb. 25, 1794.

[8] Report from the Committee appointed to inspect the Lords' Journals April 30, 1794, Works (Bohn's ed.) vi 470-506.

of the rules which defined these relaxations which were gradually building up the modern law;[1] and the reports show that, in the early stages of this work, the decisions of Mansfield and his fellow judges played no inconsiderable part.

Constitutional Law.

The contribution made by Mansfield and his colleagues to many different branches of constitutional law is considerable. We have seen that they, like their predecessors and successors, maintained a firm control over the activities of the persons and bodies entrusted with the local government of the country;[2] and that, as a result of this control, they were laying the foundation of various branches of local government law.[3] But the most important contribution made by Mansfield himself to constitutional law is in the sphere of central government. The leading cases in which he made this contribution have been discussed in the two preceding volumes of this History, so that, at this point, it is only necessary to recall them briefly, in order that we may be able to appreciate the extent of his contribution to the development of this branch of the law.

In the case of *Triquet v. Bath*,[4] which asserted the diplomatic immunity of foreign ministers and their servants, the question of the relation of international law to English law was discussed; and a good account was given of the discussion of this same question by Lord Talbot in *Barbuit's Case*, which, Mansfield tells us, he had argued.[5]

Three cases lay down important principles as to the liberty of the subject. In the case of *Money v. Leach*[6] Mansfield and the court of King's Bench upheld Camden's decision that general warrants were illegal.[7] In *Sommersett's Case*[8] he held, in effect, that the status of slavery was not "allowed or approved by the law of England."[9] But in *R. v. Tubbs*[10] he held that one exception to the right of personal liberty was the prerogative of the Crown to impress seafaring men; and he based it upon "that trite maxim of the constitutional law of England 'that private mischief had better be submitted to than that public detriment and inconvenience should ensue.'"[11]

[1] As Burke said, Works (Bohn's ed.) vi 482, "the supposed rules of evidence have, in late times and judgments, instead of being drawn to a greater degree of strictness, been greatly relaxed"; that it was through the growth and definition of these relaxations that the law was being developed is shown by Sir Dudley Ryder's speech and by Lord Hardwicke's judgment in Omychund v. Barker (1744) 1 Atk. at pp. 29, 49, both of which are cited by Burke at pp. 477, 478.

[2] Vol. x 155-158, 243-254.

[3] Ibid. 256 seqq.

[4] (1764) 3 Burr. 1478; vol. x 372.

[5] 3 Burr. at p. 1481.

[6] (1765) 3 Burr. 1742.

[7] Vol. x 668.

[8] (1772) 20 S.T. 1; vol. x 658; cp. vol. iii 507-508.

[9] 20 S.T. at p. 82.

[10] (1776) 2 Cowp. 512.

[11] At p. 518; vol. x 382.

Two cases lay down important principles as to the position of the civil servants of the Crown, and two other cases lay down important principles as to the position of military and naval officers. The two cases dealing with the position of civil servants are *Whitfield v. Lord le Despencer*[1] and *Macbeath v. Haldimand*.[2] In the first of these cases the decision in the case of *Lane v. Cotton*[3] was approved, and it was held that an officer of the Crown is not liable for the misdeeds of his subordinates which he has neither authorized nor ratified. Though the superior officer appoints his subordinates, when appointed, they are not his servants, but the servants of the Crown.[4] It follows, therefore, that the doctrine of the employer's liability for the torts of his servants is not applicable to him. In the second of these cases it was held that an officer of the Crown who makes a contract on behalf of the government is not personally liable on the contract. The decision was based partly on the principles of the law of agency, and partly on public policy—"great inconveniences," said Ashhurst, J.,[5] "would result from considering a governor or commander as personally responsible in such cases as the present. For no man would accept of any office of trust under government upon such conditions." The two cases dealing with the position of military and naval officers are *Sutton v. Johnstone*[6] and *Parker v. Clive*.[7] The first of these cases is authority for the proposition that one officer in the army or navy cannot sue another for anything done in the execution of his duty as officer, even though the plaintiff is able to prove that the defendant acted maliciously. We have seen that this proposition rests on the dicta of Mansfield and Loughborough, that it has been followed in the nineteenth century, but that the authority of that decision is impaired by the powerful dissenting judgment of Cockburn, C.J.[8] The second of these cases, which was followed in the same year in the case of *Vertue v. Clive*[9] and by a nineteenth century case,[10] decides that an officer is not at liberty to resign his commission as and when he pleases.

Some of the most important of Mansfield's decisions are in the sphere of colonial constitutional law. The case of *Campbell v. Hall*[11] is the leading case on the differences between conquered and settled colonies. The case of *R. v. Vaughan*[12] deals with the question of the law in force in different kinds of colonies, and the applicability of English law, enacted and unenacted, to the

[1] (1778) 2 Cowp. 754; vol. x 655.
[2] (1786) 1 T.R. 172; vol. x 652.
[3] (1701) 1 Ld. Raym. 646; vol. vi 267-268.
[4] 2 Cowp. at p. 765.
[5] 1 T.R. at pp. 181-182.
[6] (1786) 1 T.R. 493; vol. x 384-385.
[7] (1769) 4 Burr. 2419.
[8] Vol. x 385-386.
[9] (1769) 4 Burr. 2472.
[10] R. v. Cuming (1887) 19 Q.B.D. 13.
[11] (1774) 1 Cowp. 204; vol. xi 236-238.
[12] (1769) 4 Burr. 2494 at p. 2500; vol. xi 243-244.

colonies. The case of *Mostyn v. Fabrigas* [1] deals with the position of a colonial governor, and his liability to be sued in an English court for illegal acts. We have seen that the dictum in that case, that he is not liable to be sued in the courts of his colony, has been overruled.[2] With these cases should be mentioned the case of *R. v. Cowle*.[3] That case deals primarily with the position of the town of Berwick-on-Tweed. But, in the course of his very long and learned judgment, Mansfield explained that the prerogative writs could issue "to every dominion of the Crown of England," [4] though it might not always be expedient to exercise this jurisdiction. He said : [5]

> To foreign dominions, which belong to a prince who succeeds to the throne of England, this court has no power to send a writ of any kind. We cannot send a habeas corpus to Scotland, or to the electorate : but to Ireland, the Isle of Man, the plantations, and, as since the loss of the Dutchy of Normandy, they have been considered as annexed to the Crown in some respects, to Guernsey and Jersey, we may . . . But notwithstanding the power which the court have, yet when they cannot judge of the cause, or give relief upon it, they would not think it proper to interpose.[6]

Lastly, the case of *Land v. Lord North and the Bank of England* [7] illustrates the fact that the old rule that a person who gets possession of goods belonging to an alien enemy, acquires them by *occupatio*, was obsolete.[8] The plaintiff was the master of a Prussian ship. He had on board goods which were enemy property. When the goods were brought to England they were seized by Lord North, as Warden of the Cinque Ports, in the right of the Crown, and were in the custody of the Bank of England. The plaintiff brought detinue against Lord North and the Bank. Mansfield said that,[9]

> in order to warrant a judgment for the plaintiff it must appear that he has right. But in fact he has none. He claims on behalf of an enemy, which he cannot do against the Crown.

This ruling is not quite decisive, since the court rightly treated the plaintiff as claiming, not on his own behalf, but on behalf of the enemy ; but, later in his judgment, Mansfield treats it as

[1] (1774) 1 Cowp. 161 ; vol. xi 255-256.
[2] Vol. xi 257-258.
[3] (1759) 2 Burr. 834.
[4] 2 Burr. at p. 856.
[5] Ibid.
[6] "Therefore," he said, "upon imprisonments in Guernsey and Jersey, in Minorca, and in the plantations, I have known complaints to the King in Council, and orders to bail or discharge ; but I do not remember an application for a writ of habeas corpus. Yet cases have formerly happened of persons illegally sent from hence and detained there, where a writ of habeas corpus out of this court would be the properest and most effectual remedy," ibid ; for the statutory restriction of the power to issue the writ of habeas corpus to any colony having a court with authority to issue the writ, see vol. ix 124-125.
[7] (1785) 4 Dougl. 266.
[8] For this rule and its history see vol. vii 481-484.
[9] 4 Dougl. at p. 274.

a settled principle that all enemy property coming into the kingdom belongs to the King.[1]

Criminal Law.

From the point of view of the eighteenth century, Mansfield's most important contribution to the criminal law was in those libel cases, which belong as much to constitutional as to criminal law, in which the question of the powers of the jury to give a general verdict was at issue.[2] His final statement of the law on this matter was his judgment in the *Dean of St. Asaph's Case*,[3] in which he attempted to prove that his view of the powers of the jury was technically right and politically expedient. We have seen that neither Parliament nor the experience of posterity has ratified Mansfield's views on this matter.[4] For all that, his judgment is a great intellectual effort, in which the learning and experience of a long judicial life is authoritatively summed up—as Erskine later said, Mansfield treated him "not with contempt indeed, for of that his nature was incapable; but he put me aside with indulgence, as you would do a child while it is lisping its prattle out of season." [5]

There are a number of cases which show that the court continued to exercise the jurisdiction, which it had taken over from the Star Chamber, to treat as crimes practices which, being harmful to the community, amounted to a public mischief.[6] In the case of *R. v. Vaughan* [7] Mansfield held that it was a misdemeanour to attempt to bribe a privy councillor to procure the grant of an office; and in the case of *R. v. Bembridge* [8] he held that

> where there is a breach of trust, fraud or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and subject it is indictable.[9]

This principle, he pointed out, was as old as the Year Books; [10] and he deduced from it the rule that

[1] "If the property appears to be in the Crown, it becomes a case of generosity whether the Crown will take advantage of that *summum jus* which undoubtedly gives all enemies' property coming into this kingdom to the King, or whether in this, a case of calamity, it shall be restored to the owner," 4 Dougl. at p. 274.

[2] Vol. x 673 seqq.

[3] R. v. Shipley (1784) 4 Dougl. at pp. 162-171; vol. x 677-679.

[4] Ibid. 693-694.

[5] R. v. Paine (1792) 22 S.T. at p. 437.

[6] Vol. i 504; vol. viii 382.

[7] (1769) 4 Burr. 2494.

[8] (1783) 3 Dougl. 327.

[9] At p. 332.

[10] "An indictment has been sustained for concealing public money, 27 Ass. pl. 17, though this, as against a private person, would only have been actionable," ibid; the Book of Assizes runs as follows: "Presentum fuit que G de L et un autre avoient levie c. marcs del conte pour l'array de certain Archiers: queux deniers ne viendront unque en profit du Roy etc."

all misdemeanours whatsoever of a public evil example against the common law may be indicted; but no injuries of a private nature unless they someway concern the King.[1]

Thus the breach of a contract,[2] or an ordinary trespass,[3] are not indictable as crimes. On the other hand, the cases which laid it down that certain offences against religion or *contra bonos mores* were misdemeanours, were approved;[4] and *a fortiori* if these offences were the result of a conspiracy.[5] So too a libel on the administration of justice in a particular case was held to be a misdemeanour.[6]

In the case of *R. v. Aylett* Mansfield concisely summed up the constituent elements of the crime of perjury.[7] In the case of *R. v. Rudd* he held that confessions made by prisoners under threats or promises could not be used against them on their trials;[8] and he laid down the rule, which was substantially approved by all the judges,[9] that if an accomplice confesses the whole truth, is admitted as King's evidence, and the evidence is used to convict the accused; then, though he is not entitled as of right to a pardon, the practice is not to prosecute him, and he has an equitable right to a recommendation to a pardon.[10] In the case of *R. v. Fielding*[11] the court laid it down that if criminal proceedings were brought against a justice of the peace, the prosecutor must, in fairness to the accused, give up his right to take civil proceedings. We have seen that in the case of *R. v. Kennett*[12] he laid down the rule, which was acted upon in

[1] 3 Dougl. at p. 332; for the modern development of this principle see W. T. S. Stallybrass, Public Mischief, L.Q.R. xlix 183-191.

[2] R. v. Wheatly (1761) 2 Burr. 1125.

[3] R. v. Storr (1765) 3 Burr. 1698; R. v. Atkins (1765) ibid 1706; R. v. Blake (1765) ibid 1731.

[4] R. v. Delaval (1763) 3 Burr. 1434, at pp. 1438-1439; vol. viii 407-408.

[5] 3 Burr. at p. 1439; cp. R. v. Green (1781) 3 Dougl. 36—information for a conspiracy to take an infant of fortune from his father's house in order to marry him to one of the conspirators.

[6] R. v. Watson (1788) 2 T.R. 199.

[7] "I take the circumstances necessary to be these; the oath must be taken in a judicial proceeding, before a competent jurisdiction; and it must be material to the question depending. If there be any doubt on the words of the oath, which can be made more clear and precise by a reference to a former matter, that may be supplied by an innuendo (1785) 1 T.R. at p. 69.

[8] (1775) 1 Cowp. at p. 334. [9] At pp. 339-340.

[10] "There is besides a practice, which indeed does not give a legal right; and that is, where accomplices having made a full and fair confession of the whole truth, are in consequence thereof admitted evidence for the Crown, and that evidence is afterwards made use of to convict the other offenders. If in that case they act fairly and openly, and discover the whole truth, though they are not entitled of right to a pardon, yet the usage, the lenity, and the practice of the Court is, to stop the prosecution against them, and they have an equitable title to a recommendation for the King's mercy," at p. 334; cp. the judges' statement cited vol. xi 553 n. 4.

[11] (1759) 2 Burr. 719 at p. 720; but in the case of bribery the statutes allowed both the criminal and the civil remedy to be pursued, see Combe v. Pitt (1764) 3 Burr. 1586.

[12] (1781) 5 Car. and P. at pp. 294-295; vol. x 706.

R. v. Pinney,[1] that a magistrate who negligently fails to take proper measures to suppress a riot is guilty of a misdemeanour.

The Land Law, Contract, and Tort.

The decisions of the court of King's Bench during Mansfield's tenure of office, left their mark on the *Land Law*. It is true that Mansfield's attempt in the case of *Taylor v. Horde*,[2] to reform the law as to seisin and disseisin,[3] and his attempt in the case of *Perrin v. Blake* [4] to reduce the rule in *Shelley's Case* to the level of a rule of construction, failed. But we have seen that, though those attempts failed, they forecasted correctly the course taken by the legislative reforms of the following centuries.[5] Besides these two famous cases there are others in which Mansfield's criticisms of the law, and his suggestions for reform, have found favour with the Legislature in the nineteenth and twentieth centuries. Thus he said that the rule that a devise of land without words of limitation gave only a life estate, had the effect "of defeating the intention of the testator in almost every case that occurs"; [6] he pointed out that the rule that a devise to a child and his heirs lapsed, if the child died before the testator, might have a similar effect; [7] and he criticized the rule, which followed from the nature of a will of realty,[8] that if a man devised an estate, and afterwards conveyed it away, the devise was revoked, although he took it back by the same instrument or by a declaration of uses.[9] All of these defects in the law were remedied, in a manner which Mansfield would have approved, by the Wills Act 1837.[10] That Act also swept away some complicated law as to the effect upon a will of the testator's marriage and the birth of a child, by enacting that marriage should in all cases operate as a revocation.[11] Mansfield's view that a will made in contemplation of a marriage should not be revoked by the marriage,[12] has been given effect

[1] (1832) 3 B. and Ad. 947; vol. x 706.
[2] (1757) 1 Burr. 60; vol. vii 55-56. [3] Ibid 43-44.
[4] (1770) 4 Burr. 2579; Collect. Jurid. i 283; vol. iii 109-110.
[5] Vol. vii 77-78, 79; § 131 of the Law of Property Act, 1925, abolishes the rule in Shelley's Case.
[6] Loveacres v. Blight (1775) 1 Cowp. at p. 355.
[7] White v. Warner (1781) 3 Dougl. at pp. 9-10.
[8] Vol. vii 362, 364 n. 8, 365-366; below 516 and n. 11.
[9] Roe v. Griffits (1766) 4 Burr. at p. 1960; "the rule," said Mansfield, "being now established, must be adhered to; although it is not founded upon truly rational grounds and principles, nor upon the intent, but upon legal niceties and subtilty."
[10] 1 Victoria c. 26 §§ 23, 28, 33. [11] § 18.
[12] "The testator disposes of a small part of his estate to a charity. Then, in contemplation of his marriage, he settles £800 a year upon his intended wife, with remainder to himself in fee. It is clear that he contemplated the change in his situation after the will, and provided for it as to his wife; and, with regard to the children, he may well be disposed to say, I will keep them in my own power," Brady v. Cubitt (1778) 1 Dougl. at p. 39.

to by the Law of Property Act 1925.[1] Similarly, he anticipated the Voluntary Conveyances Act of 1893 [2] by holding that the Act of 1584-1585 [3] did not affect a voluntary settlement which was not fraudulent.[4]

There were still surviving in the land law many survivals of mediæval ideas, and many technicalities originating from the complicated rules of procedure by which the real actions were governed. Thus in the case of *Trelawney v. Bishop of Winchester* [5] the effect of the statute of 1558 [6] upon the right of a bishop to grant freehold offices was considered. It was held that the power of the bishops to grant these offices was not affected by the statute of 1558, provided they were in existence before 1558, and that no more than the ancient fee was to be taken.[7] In the case of *Swann v. Broome* [8] it was held that if, in a common recovery, a tenant in tail had been vouched to warranty and had not appeared, and, owing to his death, could not appear to the writ summoning him to vouch to warranty, the common recovery was void, although his appearance was mere form, and he had done all that was essential to the suffering of a recovery.[9]

We have seen that some of Mansfield's decisions helped to adapt the action of ejectment to its new function of trying the title to freehold.[10] Thus in the case of *Aslin v. Parkin* [11] the judges, on a reference from Mansfield, resolved that

> the nominal plaintiff and the casual ejector are judicially to be considered as the fictitious form of an action really brought by the lessor of the plaintiff against the tenant in possession; invented under the control and power of the court, for the advancement of justice in many respects; and to force the parties to go to trial on the merits, without being intangled in the nicety of pleadings on either side.

It was largely because the action of ejectment thus enabled the court to consider the substantial merits of the case, that we get in many cases clear statements of substantive principles. Thus, in several cases the nature of a devise of land, and the reason why wills of land were treated differently from wills of personalty, were explained.[11] In the case of *Roe v. Harvey* [12] Mansfield,

[1] § 177 (1). [2] 56, 57 Victoria c. 21.
[3] 27 Elizabeth c. 4; vol. iv 481-482.
[4] "The statute does not say a voluntary settlement shall be void, but that a fraudulent settlement shall be void. There is no part of the Act of Parliament, which affects voluntary settlements *eo nomine*, unless they are fraudulent," Doe v. Routledge (1777) 2 Cowp. at p. 708; cp. Cadogan v. Kennett (1776) 1 Cowp. at p. 434, cited vol. iv 482 n. 1.
[5] (1757) 1 Burr. 219. [6] 1 Elizabeth c. 19. [7] 1 Burr. at p. 225.
[8] (1764) 3 Burr. 1595. [9] At pp. 1601-1602. [10] Vol. vii 15-16.
[11] (1758) 2 Burr. at pp. 667-668.
[11] Windham v. Chetwynd (1757) 1 Burr. at p. 429; Swift v. Roberts (1764) 3 Burr. at p. 1496; Harwood v. Goodright (1774) 1 Cowp. at p. 90; Hogan v. Jackson (1775) 1 Cowp. at pp. 305-306; vol. vii 363-366.
[12] (1769) 4 Burr. 2484.

" reasoning from the nature of an ejectment," and from the rule that the plaintiff must recover on the strength of his own title, laid down the fundamental principle of English law that " possession gives the defendant a right against every man who cannot shew a good title." [1] In the case of *Holford v. Hatch* [2] the rule that an underlessee is not liable to a landlord on the covenants made by his lessor with the landlord, was restated. We have seen that it was an old rule that, though at common law covenants may bind the assignee of the whole estate of a lessor, they cannot bind an underlessee who takes from the lessor a new and different estate.[3] It was therefore somewhat surprising that in this case the court was " for some time divided." [4]

In the case of *Mayor of Hull v. Horner* [5] the conditions under which a lost grant of an incorporeal thing could be presumed from long user, and the relation of such a presumption to a plea of the statute of limitations or of prescription at common law, were explained.[6] A statute of limitations or prescription at common law bars the claim, so that a jury is concluded by it. But long user is merely evidence of the existence of a fact, and " may be left to the consideration of the jury to be credited or not." Thus, " there is no statute of limitations that bars an action upon a bond; but there is a time when the jury may presume the debt to be discharged." Similarly,

> if a foundation can be laid that a record or a deed existed, and was afterwards lost, it may be supplied by the next best evidence to be had, or if it cannot be shown that it ever existed, yet enjoyment under a title which can only be by record, is strong evidence to be left to a jury that it did once exist. . . . It would be mischievous, if it were to be laid down, that there can be no presumption since the time of Richard I to confirm a title by charter.

As we have seen, it was shortly after the date of this case that the doctrine that a prescriptive title could be based on a modern lost grant was established.[7] In the case of *Clarkson v. Woodhouse* [8] the distinction between a prescription and a custom, as a title to property, was clearly explained.[9]

We have seen that if Mansfield's attempt to recast the doctrine of consideration had succeeded, the modern development of the *Law of Contract* would have been changed.[10] But we have

[1] At p. 2487.
[2] (1779) 1 Dougl. 183.
[3] Vol. iii 158; vol. vii 291.
[4] 1 Dougl. at p. 187.
[5] (1774) 1 Cowp. 102.
[6] At pp. 108-109.
[7] Vol. vii 347-348.
[8] (1782) 3 Dougl. 189.
[9] " When an individual claims an immemorial right to any estate or privilege . . . that is a prescription in him; but if there exists a general rule of property defined within certain limits and local descriptions, this rule . . . becomes the law of the place, governing all property situated within those limits, in whatever place the owner of that property may happen to reside. . . . If an estate be within a manor, the custom, which is the law of the manor, directs the estate," at pp. 192-193.
[10] Vol. viii 34.

seen that this attempt did not succeed, that the rule that no simple contract is valid without a consideration was established,[1] and that the modern doctrine of consideration was settled on lines which were remarkable for the historical and logical correctness with which it was deduced from its procedural origins in the action of assumpsit.[2] But though Mansfield did not succeed in effecting this far-reaching change in the law of contract, his decisions have had some influence upon the development of a considerable number of the rules of this branch of the law.

The question of the capacity of an infant to make contracts, and to bind himself by other acts in the law, was considered in several cases. Certain acts done by an infant were held to be binding. Otherwise, said Mansfield,[3]

> miserable must the condition of minors be; excluded from the society and commerce of the world; deprived of necessaries, education, employment, and many advantages; if they could do no binding acts. Great inconvenience must arise to others, if they were bound by no act. The law, therefore, at the same time that it protects their imbecility and indiscretion from injury through their own imprudence, enables them to do binding acts for their own benefit; and without prejudice to themselves for the benefit of others.

Thus an infant who had had the benefit of the ownership of property was liable to pay rent and to satisfy other obligations connected therewith.[4] His contracts for necessaries, and other contracts for his benefit, were valid.[5] Money paid by an infant could not be recovered back,[6] and he could receive money due to himself.[7] All acts which he ought or could be compelled to do, such as payment of rent or admitting copyholders, were valid.[8] His deed was voidable only—not, like the deed of a married woman, void.[9]

Several cases illustrate the circumstances in which a contract might be held to be void for illegality—a contract to bribe an official;[10] a contract to pay a gaming debt, but not a contract to pay money lent to game with;[11] a contract in restraint of marriage.[12] In the case of *Bexwell v. Christie*[13] Mansfield held

[1] Vol. viii 35-36. [2] Ibid 42.

[3] Zouch v. Parsons (1765) 3 Burr. at p. 1801.

[4] Evelyn v. Chichester (1765) 3 Burr. 1717; Earl of Buckinghamshire v. Drury (1761) 2 Eden at p. 72; cp. Maddon v. White (1787) 2 T.R. 159, at p. 161 *per* Buller J.

[5] Earl of Buckinghamshire v. Drury (1761) 2 Eden at p. 72.

[6] Ibid. [7] Ibid.

[8] Zouch v. Parsons (1765) 3 Burr. at pp. 1801, 1806.

[9] Ibid at p. 1805. [10] Stotesbury v. Smith (1760) 2 Burr. 924.

[11] Robinson v. Bland ibid 1077.

[12] Lowe v. Peers (1768) 4 Burr. 2225; cp. Long v. Dennis (1767) 4 Burr. at p. 2055 where Mansfield laid it down that "conditions in restraint of marriage are odious. . . . They are contrary to sound policy."

[13] (1776) 2 Cowp. 395—a decision approved by Kenyon C.J. in Howard v. Castle (1796) 6 T.R. 642, who said at p. 644 that the whole of Mansfield's reasoning was "founded on the noblest principles of morality and justice."

that an owner of goods, who puts up his goods to be sold by auction, may set a reserve price, but cannot bid for them himself—" What is the nature of a sale of auction? It is that the goods shall go to the highest real bidder. But there would be an end to that, if the owner might privately bid upon his own goods." [1] To allow the owner to bid was, he said, " a fraud upon the sale and upon the public." [2] The case of *Shubrick v. Salmond* [3] shows that the rule laid down in *Paradine v. Jane*,[4] that impossibility was no defence to an action for the breach of an express covenant, was still rigidly maintained. In the case of *Forward v. Pittard* [5] the old rule as to the strict liability of the common carrier was applied; and Mansfield gave a definition of the circumstances in which a loss could be said to have been occasioned by an act of God,[6] so that the carrier incurred no liability, which was followed by Cockburn, C.J., in the case of *Nugent v. Smith*.[7]

The rules as to when a sum of money, fixed by the parties to be paid if a contract was broken, was a penalty, and when it was liquidated damages, were being developed. As Buller and Ashhurst, JJ., pointed out in the case of *Fletcher v. Dyche*,[8] if the sum fixed represented an agreement by the parties as to the amount of the damages, in a case where it would be otherwise difficult to ascertain the quantum, the sum fixed was not a penalty, and could be recovered as liquidated damages. But at this period it was open to the plaintiff either to sue by action of debt for the penalty, or to bring an action of assumpsit or covenant for such damages as he had sustained.[9] If he adopted the former course, and recovered the full penalty, he had no further right of action.[10] If he adopted the latter course, he could bring a new action for successive breaches of contracts.[11] However, it did not follow that if he sued for the penalty and recovered judgment, that he would get the whole amount recovered, because an Act of 1697 [12] had provided that if an action were brought for a penalty, the plaintiff might assign breaches, and could only recover the damage suffered by those breaches. The same judgment was to be entered as formerly, but the

[1] At p. 397. [2] At p. 396. [3] (1765) 3 Burr. 1637.
[4] (1648) Aleyn 26; vol. viii 64. [5] (1785) 1 T.R. 27.
[6] " Now what is the act of God? I consider it to mean something in opposition to the act of man: for everything is the act of God that happens by His permission; everything, by His knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the King's enemies, or by such act as could not happen by the intervention of man, as storms, lightnings, and tempests," at p. 33.
[7] (1876) 1 C.P.D. at pp. 435-438. [8] (1787) 2 T.R. at pp. 36, 37.
[9] Lowe v. Peers (1768) 4 Burr. at p. 2228.
[10] Bird v. Randall (1762) 3 Burr. at pp. 1351-1352.
[11] Ibid. [12] 8, 9 William III c. 11 § 8.

judgment was only to be a security for the damages which could be proved to have been suffered. It was long thought that the effect of this statute was that a plaintiff could, as before, sue for and get a judgment for the whole penalty; but that the judgment was only a security for such damages as the plaintiff could afterwards show that he had suffered.[1] But to allow a plaintiff to proceed in that way was a roundabout way of getting the benefit intended by the statute; and so it was held at the end of the century that plaintiffs must always assign the breaches of the contract of which they complained, and could only get judgment for the amount of damages which they could prove that they had sustained.[2]

We have seen that in the case of *Kingston v. Preston*[3] Mansfield recognized that the stipulations in a contract might be not only dependent or independent, but also concurrent; and that this recognition of the existence of concurrent conditions helped to get rid of some unsatisfactory law, which had grown up when it was thought that all stipulations must be either dependent or independent. We have seen, too, that the circumstances in which a plaintiff must sue by an action of special assumpsit, and the circumstances in which he must sue by an action of *indebitatus assumpsit* or on a *quantum meruit*, were beginning to be distinguished at the end of the eighteenth century.[4] In the case of *Weston v. Downes*[5] it was held that if the special contract was still in existence and unrescinded, an action of *indebitatus assumpsit* would not lie—a decision which rests upon a similar principle to cases of the type of *Cutter v. Powell*[6] and *Hulle v. Heightman*,[7] though it was applied to a different species of claim.[8] On the other hand, if the special contract were rescinded, an action of *indebitatus assumpsit* would lie to recover money paid under it.[9]

Wagers were legal contracts. It was therefore possible to bring actions upon them; and many actions were brought. Though some judges thought that it would have been better for the public if the courts had declined to entertain such actions,[10]

[1] "The true construction and substantial justice of the Act is, that the penalty shall not be levied in any case whatever; . . . the statute directs that the judgment shall be entered as heretofore; but then it is only to stand as a security for the damages sustained. The plaintiff is not to assign the breaches till after the judgment is given. If the plaintiff should take out execution for the whole penalty, then is the time to complain," Goodwin v. Crowle (1775) 1 Cowp. at p. 359.

[2] Roles v. Rosewell (1794) 5 T.R. 538; Hardy v. Bern (1794) ibid 636; cp. Astley v. Weldon (1801) 2 B. and P. at p. 354 *per* Chambre J.

[3] (1773) 2 Dougl. at p. 691; vol. viii 75.

[4] Ibid 75-76.

[5] (1778) 1 Dougl. 23.

[6] (1795) 6 T.R. 320; vol. viii 76.

[7] (1802) 2 East 145.

[8] See Smith, L.C. (13th ed.) 22.

[9] Towers v. Barrett (1786) 1 T.R. 133.

[10] "Perhaps it would have been better for the public if the Courts had originally determined that no action to enforce the payment of wagers should be permitted," Atherfold v. Beard (1788) 2 T.R. at p. 616 *per* Ashhurst J.

it would hardly have been possible to adopt this policy at a time when the device of a bet, in the shape of a feigned issue, was used to settle the facts at issue in a Chancery suit.[1] Thus in the case of *Earl of March v. Pigot*[2] a bet by two sons on the lives of their fathers, and in the case of *Jones v. Randall*[3] a bet on the result of an appeal to the House of Lords, were held to be legal and enforceable contracts. But in the latter case it was said that if a bet were contrary either to the principles of morality, or to sound policy, it would not be enforceable.[4] On the former principle a bet on the sex of the Chevalier D'Eon,[5] and on the latter principle bets between two electors on the result of an election,[6] and on the amount of the hop duty,[7] were held to be unenforceable. A bet which was a mere disguise for the evasion of a legal prohibition, such as the prohibition of simony[8] or usury,[9] was void for illegality. But a bet could not be avoided on the ground that it evaded the usury laws, unless it was proved that the parties had intended to cloak a loan at excessive interest in the form of a bet.[10]

Many branches of the *Law of Tort* are illustrated by the decisions of Mansfield and his colleagues. We have seen[11] that the nature of the action of trover was explained in the cases of *Cooper v. Chitty*[12] and *Hambly v. Trott*.[13] Though the distinction between the spheres of trover and trespass is not clearly drawn in the former case,[14] the fact that the plaintiff must prove a right good, not merely as against the defendant, but as against the whole world, was emphasized.[15] In the latter case it was held that, though the action was an action used to protect proprietary rights, its delictual character was so marked that the maxim *actio personalis moritur cum persona* must be applied to it.[16] In the case of *Ross v. Johnson*[17] it was held that, since the gist of the action was a conversion, it could not be brought for

[1] Vol. ix 357.

[2] (1771) 5 Burr. 2802—"It was a contract made at Newmarket. The wager was originally proposed between young Mr. Pigot, the present defendant, and young Mr. Codrington, to run their fathers (to use the phrase of that place), each against the other."

[3] (1774) 1 Cowp. 37. [4] At p. 39.

[5] Da Costa v. Jones (1778) 2 Cowp. 729.

[6] Allen v. Hearn (1785) 1 T.R. 56.

[7] Atherfold v. Beard (1788) 2 T.R. 610.

[8] "As in evasions of simony, when a person who wanted to be made a bishop, conversing with a person who had most interest at Court upon the subject of a see that was then vacant, said, 'I will bet you so much, naming a considerable sum, that I have not the bishoprick.' This was a mere colour to disguise what was the real intention of the party, which was to purchase it," Jones v. Randall (1774) 1 Cowp. at p. 39 *per* Lord Mansfield C.J.

[9] Button v. Downham (1599) Cro. Eliza. 643.

[10] Lamego v. Gould (1759) 2 Burr. 715.

[11] Vol. vii 417, 429, 441-442. [12] (1756) 1 Burr. 20.

[13] (1776) 1 Cowp. 371. [14] Vol. vii 417. [15] Ibid 429.

[16] Ibid 441-442. [17] (1772) 5 Burr. 2825; cp. vol. vii 432.

a mere non-feasance. It would not lie, therefore, for a non-delivery of goods, as distinguished from a refusal to deliver. For damage caused by a non-delivery an action on the case was the proper remedy. Though Mansfield said that he disliked "nonsuits founded upon objections which had no relation to the merits of the case," [1] it is clear from this case that if the plaintiff mistook his form of action, a nonsuit was inevitable. On a similar principle, when a plaintiff sued in case for an imprisonment directed by a justice of the peace on his own account, and not on the information of a plaintiff, he was nonsuited, because he should have brought an action of trespass.[2]

In the law as to defamation the case of *Peake v. Oldham* [3] shows that Mansfield was in favour of the rules laid down by Holt, Parker, and Hardwicke, C.JJ.,[4] that the words complained of must be taken in their ordinary sense. The courts were declining to follow those seventeenth-century cases, which refused to allow an action for slander, if the ingenuity of counsel could extract a non-defamatory sense from them.[5] "What?" said Mansfield,[6]

> after a verdict shall the Court be guessing and inventing a mode, in which it might be barely possible for these words to have been spoken by the defendant, without meaning to charge the plaintiff with being guilty of murder? Certainly not. Where it is clear that the words are defectively laid, a verdict will not cure them. But where, from their general import, they appear to have been spoken with a view to defame a party, the Court ought not to be industrious in putting a construction upon them, different from what they bear in the common acceptation and meaning of them.

The nature of the defence of qualified privilege was explained in the case of *Weatherston v. Hawkins*.[7] In this case the alleged libel was contained in a letter giving the character of a servant, and Buller, J. explained that, to succeed in an action in these circumstances, the words must be malicious as well as false.[8] In the case of *Hargrave v. Le Breton* [9] it was held that to succeed in an action for slander of title, or the analogous action for false

[1] 5 Burr. at p. 2827.

[2] Morgan v. Hughes (1788) 2 T.R. 225; Ashhurst J. said at p. 231: "The general distinction is this; where the immediate act of imprisonment proceeds from the defendant, the action must be trespass, and trespass only; but where the act of imprisonment by one person is in consequence of information from another, then an action upon the case is the proper remedy, because the injury is sustained in consequence of the wrongful act of that other."

[3] (1775) 1 Cowp. 275.

[4] Ward v. Reynolds (1714) cited 1 Cowp. at p. 278; vol. viii 356 n. 4.

[5] Ibid 355-356, 359-360.

[6] 1 Cowp. at pp. 277-278.

[7] (1786) 1 T.R. 110.

[8] At pp. 111-112.

[9] (1769) 4 Burr. 2422.

statements injurious to the plaintiff's title to goods,[1] malice must be proved.

In the case of *Farmer v. Darling*[2] it was settled that to succeed in an action for malicious prosecution malice and absence of reasonable and probable cause must both concur; and in the case of *Brown v. Chapman*[3] that an action lies for maliciously suing out a commission of bankruptcy.

Theoretically breaches of sexual morality were the province of the ecclesiastical courts. But there were two classes of cases in which they fell within the province of the law of tort. The first class of cases were actions for criminal conversation, which were by no means infrequent during the eighteenth century. Mansfield's conduct of the defence in one of these actions helped to establish his reputation as an advocate;[4] and he incurred some obloquy by directing the jury, in an action of this sort against the Duke of Cumberland, that, in considering the amount of the damages, they ought not to take into consideration the rank of the defendant.[5] In the case of *Wilford v. Berkeley*[6] the court held that, in such a case, the court would not set aside a verdict on the ground that the damages were excessive; and in the case of *Morris v. Miller*[7] that, as in the case of a prosecution for bigamy, the plaintiff in such an action must prove a marriage in fact—"acknowledgement, cohabitation, and reputation are not sufficient."[8] The second class of cases were actions for seduction. We have seen that a father might bring an action for the seduction of his daughter by means of an action of trespass *quare clausum fregit*, if the seducer had entered his house as a trespasser; and that he could sue by an action on the case for damages *per quod servitium amisit*, if, and only if, the daughter could be regarded as being in his service.[9] Both these expedients are illustrated by cases of this period.[10]

In the case of *Tarlton v. Fisher*[11] Mansfield pointed out that

[1] This action was called by the defendant's counsel an action of slander of title, but by the plaintiff's counsel an action on the case for a real injury sustained by him, ibid; for the action of slander of title and its offshoot the action for injurious falsehood, see vol. viii 351-352.

[2] (1766) 4 Burr. 1971, at p. 1974.

[3] (1763) 3 Burr. 1418.

[4] (1738) Cibber v. Sloper, Campbell, Chief Justices ii 341-343.

[5] Ibid. 425-426; Campbell says: "We may safely acquit him of all corruption and sycophancy in this direction; and it is somewhat countenanced by the converse proposition of an eminent judge in a similar action, which a nobleman brought against his coachman, and in which the jury gave £10,000 damages. But it is quite at variance with the usual evidence in these cases that the defendant is a man of large property"; Junius in his letter to Mansfield did not overlook this direction to the jury.

[6] (1758) 1 Burr. 609.

[7] (1767) 4 Burr. 2057.

[8] At p. 2059.

[9] Vol. viii 428-429.

[10] Postlethwaite v. Parkes (1766) 3 Burr. 1878; Bennett v. Allcott (1787) 2 T.R. 166.

[11] (1781) 2 Dougl. 671.

in an action of trespass the principle of liability applied was more strict than in an action on the case. "In trespass, innocence of intention is no excuse; in case, the whole turns upon it; malice, or the *quo animo*, is the very gist of the action." [1] But we have seen that even in trespass Mansfield recognized that there was no liability for an accidental and involuntary act; [2] and that these decisions paved the way for a further mitigation of the strictness of the mediæval liability for trespass in some classes of cases.[3] We have seen also that it was through the actions on the case that the conception of negligence came to be recognized as a basis of liability.[4] Mansfield's statement in the case of *Tarlton v. Fisher*, though perhaps loosely expressed, is a recognition of the historical truth that it was through the actions on the case that new principles of civil liability were being introduced into the common law.

Commercial and Maritime Law.

Mansfield's achievement in settling the leading principles of these branches of the law was regarded by his contemporaries as his most important contribution to the development of the law; and the judgment of his contemporaries has been ratified by posterity. Buller's well-known appreciation of his achievement [5] has been indorsed by Campbell [6] and Foss,[7] and by all who have studied the history of mercantile law.[8] With the effect of Mansfield's decisions upon the development of these branches of the law it will be necessary to deal in some detail in the second Part of this Book. At this point I shall first say something of Mansfield's views as to the leading characteristics of these branches of the law, and of the methods which he employed to construct a settled system of principles and rules. In the second place, I shall give some illustrations of the contribution which he made to the construction of that system.

(i) Mansfield's judgments show that he considered that commercial and maritime law were distinguished from other branches of law by three leading characteristics. In the first place, he stressed the characteristic of universality which these branches of law had inherited from the mediæval law merchant, and had always preserved, notwithstanding the rise of the

[1] At p. 674.
[2] Beckwith v. Shordike (1767) 4 Burr. at pp. 2093-2094; Davis v. Saunders (1770) 2 Chitty (K.B.) 639.
[3] Vol. viii 456, 466. [4] Ibid 449-451.
[5] Lickbarrow v. Mason (1793) 2 T.R. at p. 73, cited vol. i 572 n. 6; above 282.
[6] Lives of the Chief Justices ii 403-405. [7] Lives of the Judges viii 342.
[8] See Sir John Macdonell's Introd. to Smith, Mercantile Law (11th ed.) lxxxii-lxxxiii; cp. Essays A.A.L.H. iii 13-15 (Scrutton), 75 (Cranch), 116 (Vance); MacKinnon, Origins of Commercial Law, L.Q.R. lii, 42-44.

modern state and the consequent growth of national systems of law.[1] Speaking of the contract of marine insurance he said :

> From the nature, object, and utility of this kind of contract, consequences have been drawn ; and a system of construction established, upon the ancient and inaccurate form of words in which the instrument is conceived. The mercantile law, in this respect, is the same all over the world. For from the same premises, the sound conclusions of reason and justice must universally be the same.[2]

Speaking of maritime law, he said that it

> is not the law of a particular country, but the general law of nations: " non erit alia lex Romae, alia Athenis ; alia nunc, alia posthac ; sed et apud omnes gentes et omnia tempora, una eademque lex obtinebit." [3]

Secondly, and consequently, these branches of law ought, so far as possible, to be untechnical and easily apprehended by traders who were not lawyers :

> The daily negotiations and property of merchants ought not to depend upon subtleties and niceties ; but upon rules easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case.[4]

But thirdly, if this result was to be secured, the rules must be certain :

> In all mercantile transactions the great object should be certainty ; and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon.[5]

The construction of a body of law possessing these characteristics was no easy task. If the law was to be certain and comprehensible it must possess a solid background of principle. If the law was to possess the characteristic of universality these principles must be based upon those continental bodies of commercial and maritime law which, from the mediæval period onwards, the lawyers of many nations had been developing. We have seen that in the seventeenth century Prynne had stated this self-evident truth ;[6] and that the decisions of Holt, C.J., and of some of his successors had introduced some of the principles laid down by these bodies of continental law into English law.[7] It was because Mansfield had mastered the learning of the continental lawyers that he was able to survey critically the

[1] Vol. i 526 ; vol. v 60-65.
[2] Pelly v. Royal Exchange Assurance Co. (1757) 1 Burr. at p. 347.
[3] Luke v. Lyde (1759) 2 Burr. at p. 887.
[4] Hamilton v. Mendes (1761) 2 Burr. at p. 1214 ; cp. the decision in Gardiner v. Croasdale (1760) 2 Burr 904, cited above 502.
[5] Vallejo v. Wheeler (1774) 1 Cowp. at p. 153. [6] Vol. v 147.
[7] Vol. vi 519-522 ; vol. viii 161, 173-176, 189-192, 291-292, 473-475 ; above 445, 454.

decisions of his predecessors; and by following to a larger extent and with greater knowledge than his predecessors the policy of adapting continental rules to their English environment, to base his decision on a solid background of principles, which were acceptable both to English and continental lawyers. He was the better able than any other English lawyer to extract these principles from the continental law books because his learning was far wider than that of any other English lawyer. We have seen that he was familiar with the continental treatises on commercial and maritime law;[1] and that he was learned in Scottish law, in international law, and in ecclesiastical law, as well as in the principles of common law and equity.[2] Therefore, on a solid basis of comparative law, he was able to select and emphasize the basic juridical principles which underlay the rules which governed the various activities of merchants and mariners. But if these principles were to be kept free from subtleties, if they were to be easily understood and remembered, they must be kept in close touch with current mercantile usage. Mansfield realized this truth; and because he realized it he was always ready to consult with and learn from the merchants. Thus, in the case of *Lewis v. Rucker*,[3] where the point at issue was the manner in which the amount payable by an insurer on a partial loss should be estimated, he said that he had thought a good deal of the point, and had tried to get what assistance he could "by conversing with some gentlemen of experience in adjustments."[4] In the case of *Glover v. Black* he consulted underwriters as to their practice in the drafting of policies;[5] and in the case of *Vallejo v. Wheeler* he consulted the merchants upon the question what they understood by the term "barratry."[6] It was because Mansfield, by personal consultation with the merchants, and by the information which he got from his special juries of merchants,[7] kept the law in close touch with mercantile practice, that he was able to lay down certain rules which have stood the test of time, and have guided, without hampering, the operations of trade.

In the task of constructing a system of commercial and

[1] Above 467.
[2] Above 466, 467, 469.
[3] (1761) 2 Burr. 1167.
[4] At p. 1172.
[5] (1763) 3 Burr. at p. 1401.
[6] (1774) 1 Cowp. at p. 154.
[7] Campbell, Chief Justices ii 407 *note*, tells us that he had reared a body of special jurymen with whom he was on familiar terms—"from them he learned the usages of trade, and in return he took great pains in explaining to them the principles of jurisprudence by which they were to be guided. Several of these gentlemen survived when I began to attend Guildhall as a student, and were designated and honoured as 'Lord Mansfield's jurymen.' One, in particular, I remember, Mr. Edward Vaux, who always wore a cocked hat, and had almost as much authority as the Lord Chief Justice himself"; for the growth of the practice of using special juries of merchants and its encouragement by the Legislature see Fifoot, Lord Mansfield 104-105.

maritime law upon the basis of the principles contained in the writings of continental lawyers, upon the rules laid down in the cases decided by his predecessors, and upon mercantile practice, Mansfield was faced by two difficulties. The first difficulty was to settle the question of the relation of mercantile custom to the law. The second difficulty was so to construe the old and often obscure documents, in which mercantile transactions were embodied, that they could be harmonized with legal principles and, at the same time, carry out the intentions of the parties to them.

We have seen that the question of the relation of mercantile custom to the law was a question which had been discussed in the late sixteenth and in the seventeenth centuries.[1] It had been laid down that a general custom of the merchants was part of the law. It followed that it could not be specially pleaded, and that evidence of a contradictory custom was inadmissible. But we have seen that the fact that the common lawyers were very ignorant of the contents of mercantile custom made it necessary that these customs should be specially pleaded, and that evidence should be admitted of their contents.[2] It was inevitable, therefore, that the question whether evidence ought to be admitted of mercantile custom should emerge as an important question at this period. It is clear that if such evidence was admitted in every case no stable system of commercial law could be established. Each case would be decided merely in accordance with the evidence given in that case. Mansfield's predecessors in the courts of common law and Chancery—even so eminent a lawyer as Lord Hardwicke[3]—had shown a tendency to adopt this course, with the result that, as Buller, J. said, no certain principles had been established.[4] On the other hand, if all evidence of mercantile custom had been excluded, the law might easily have lost touch with commercial practice. An intermediate course was adopted which has, to a large extent, avoided both these evils. In the first place, if the mercantile custom had been accepted as part of the common law, no evidence to prove a contradictory custom could be admitted. Thus in the case of *Edie v. East India Co.*[5] Mansfield confessed that he had erred when he had admitted evidence of mercantile custom to prove that a bill payable to A or order, and indorsed by A to B personally, could not be indorsed over by B, because it was settled law that B could indorse over.[6] But in the second place, if the law was not settled, evidence of mercantile custom was, as Wilmot, J., explained, admissible to prove as a matter of

[1] Vol. v 144-147. [2] Ibid 145. [3] Above 282.
[4] Lickbarrow v. Mason (1793) 2 T.R. at p. 73, cited vol. i 572 n. 6.
[5] (1761) 2 Burr. 1216. [6] At p. 1222.

fact what the custom was; and, if the custom was reasonable, the custom so proved might be accepted as the law.[1] Thus evidence of a usage as to a return of premium in certain eventualities, when ships were insured from Jamaica to London, was admitted.[2] As the law develops, and becomes more precise and detailed, the occasions on which "it may be fit and proper to take the opinion of merchants" will necessarily diminish. But in a changing world the law must be ever developing; and the fact that the courts have reserved to themselves the power thus to adapt the law to new conditions, helps to keep it in touch with commercial needs and practice. Cases of the nineteenth and twentieth centuries, in which this power has been used,[3] show that the courts have this power, and that its effect has helped to give the law a measure of flexibility, and to keep it in touch with new developments of mercantile practice.

The second difficulty arose from the fact that the merchants were as conservative as the lawyers in adhering to the historic forms of such documents as policies of insurance, charter-parties, and bills of lading. As the law developed, as its principles and rules became, under the stress of practical needs, more complex and more detailed, the archaic wording of these documents gave rise to many difficulties, because they did not provide for the new contingencies to which new mercantile practices gave rise, and upon which the law was called upon to pronounce. Thus, in the case of *Pelly v. Royal Exchange Assurance Co.* Mansfield alluded to "the ancient and inaccurate form of words"[4] in which policies of insurance were expressed; and in the case of *Wilson v. Smith*[5] he said that the present form of these policies was "very irregular and confused." In the case of *Hotham v. East India Co.*,[6] he said of the established form of a charter-party, that it was "an old instrument, informal, and, by the introduction of different clauses at different times, inaccurate, and sometimes contradictory." We have seen that the form of the bill of lading was stereotyped when Malynes was writing in the early years of the seventeenth century.[7] It was necessary, as Mansfield pointed out, to construe such documents liberally, and according to the true intent of the parties. At the same time this construction must be in accordance with the established principles of the law. It was the work of the courts in thus construing these documents which gradually gave them a fixed meaning, and a meaning which carried out the intention of the

[1] At p. 1228, cited above 481 n. 5.
[2] Long v. Allen (1785) J. A. Park, Marine Insurance (1st ed.) 446-447.
[3] Goodwin v. Robarts (1875) L.R. 10 Ex. 337; Bechuanaland Exploration Co. v. London Trading Bank [1898] 2 Q.B. 658; Edelstein v. Schuler [1902], 2 K.B. 144.
[4] (1757) 1 Burr. at p. 347.
[5] (1764) 3 Burr. at p. 1555.
[6] (1779) 1 Dougl. at p. 277.
[7] Vol. viii 256.

parties to them in a manner which harmonized with legal principles. It was in this way that the incidents of the most important commercial and maritime contracts were fixed, and the largest part of the law on these topics was built up. The truth of this statement is illustrated by a glance at the contribution made by Mansfield to many different branches of commercial and maritime law.

(ii) In considering Mansfield's contribution to these branches of the law, I shall consider (*a*) commercial law; (*b*) maritime law; (*c*) the law of insurance; and (*d*) the law of bankruptcy.

(*a*) Apart from the law of insurance, with which I shall deal separately, the most important topic of *Commercial Law* was the law as to negotiable instruments. We have seen that, at the beginning of the eighteenth century, bills of exchange and promissory notes were recognized as negotiable instruments,[1] that the rights and duties of the parties to these instruments were beginning to be defined,[2] and that some of the characteristics of negotiability were beginning to emerge.[3] But a large number of important points still awaited decision. The following cases illustrate a few of these points.

The fact that a *bona fide* holder for value of a negotiable instrument has a good title, even though he takes it from a person who has none, is the most important feature of negotiability. This fact had not been firmly grasped in the preceding period.[4] That it emerged quite clearly during this period is shown by the case of *Miller v. Race*,[5] which decided that the *bona fide* holder of a stolen bank-note had a good title to it because it was equivalent to money;[6] and by the case of *Grant v. Vaughan*,[7] which decided that the *bona fide* bearer of a bill made payable to bearer is in the same position as the holder of a bank-note. "Surely," said Mansfield, in the latter case,[8]

> there can be no doubt as between the man who lost the note (be it accidentally or carelessly) and a fair purchaser of it for valuable consideration. This case was determined in the case of *Miller v. Race*. . . . Whoever gives a note payable to bearer, expressly promises to pay it to every fair bearer.

It followed that the *bona fide* holder of a negotiable instrument is in the same position as the holder of a bank-note or money.

[1] Vol. viii 151-176. [2] Ibid 161-163. [3] Ibid 163-168.
[4] Ibid 165-166. [5] (1758) 1 Burr. 452.
[6] "It has been quaintly said 'that the reason why money cannot be followed is because it has no earmark'; but this is not true. The true reason is, upon account of the currency of it: it cannot be recovered after it has passed in currency. So, in case of money stolen, the true owner cannot recover it, after it has been paid away fairly and honestly upon a valuable and *bona fide* consideration: but before money has passed in currency, an action may be brought for the money itself," ibid at pp. 457-458.
[7] (1764) 3 Burr. 1516. [8] At p. 1519.

The reason for the rule in both cases was the same—the need to preserve the usefulness of these instruments as media of exchange. Mansfield said : [1]

> The holder of a bill of exchange or promissory note is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned subject to all the equity to which the original party was subject. If this rule applied to bills and promissory notes it would stop their currency. The law is settled that a holder coming fairly by a bill or note has nothing to do with the transaction between the original parties.

The case of *Heylyn v. Adamson* [2] explained clearly the nature of a bill of exchange [3] and a promissory note ; [4] the positions of the drawer, drawee, and acceptor of a bill ; [5] and of the maker and indorser of a promissory note.[6] The maker of a promissory note is in the same position as the acceptor of a bill.[7] Therefore just as the indorsee of a bill must show that he has called upon the acceptor to pay within a reasonable time, so the indorsee of a note must show that he has called upon the maker.[8] But as between indorser and indorsee each indorsement is a new bill.[9] The indorsee does not trust to the credit of the original drawer whom he does not know. The indorser is his drawer whom he trusts in case the acceptor does not pay.[10] It followed that " to entitle the indorsee of an inland bill of exchange to bring an action against the indorser, upon failure of payment by the drawee, it is not necessary to make any demand or inquiry after the first drawer " ; [11] and the same rule applied *mutatis mutandis* to promissory notes.[12] The case of *Edie v. East India Co.*[13] decided the important point that a bill payable to A or order is in its inception a negotiable instrument ; and therefore if A indorses it to B without adding the words " or order," it may be indorsed over by B, for such an indorsement does not destroy its negotiable character, and therefore its capacity to be assigned by indorsement.[14]

[1] Peacock v. Rhodes (1781) 1 Dougl. at p. 636. [2] (1758) 2 Burr. 669.

[3] " A bill of exchange is an order or command to the drawee, who has or is supposed to have effects of the drawer in his hands to pay. When the drawee has accepted he is the original debtor : and due diligence must be used in applying to him. The drawer is only liable in default of payment by him, due diligence having been used," at p. 674.

[4] " While a promissory note continues in its original shape of a promise from one man to pay to another, it bears no similitude to a bill of exchange. When it is indorsed then resemblance begins : for then it is an order by the indorser upon the maker of the note (his debtor by the note) to pay to the indorsee. This is the very definition of a bill of exchange," at p. 676.

[5] At p. 674. [6] At pp. 676-677. [7] Ibid.

[8] Ibid. [9] Ibid at p. 674. [10] Ibid at p. 675.

[11] Ibid at p. 676. [12] Ibid at pp. 676-677. [13] (1761) 2 Burr. 1216.

[14] " A draught drawn upon one person, directing him ' to pay money to another or order,' is, in its original creation, not an authority, but a bill of exchange, and is negotiable. It belongs to the payee. . . . It is his property ; and he may assign

The acceptor of a bill was primarily liable on a bill. If he accepted a forged bill, and paid it, he could not recover from the payee [1]—at any rate if he neglected to take action at once [2]—because, as later cases have explained, he had led the payee to suppose that the bill was genuine.[3] An acceptance could be conditional ; [4] but a promise to accept did not amount to acceptance "unless accompanied by circumstances which may induce a third person to take the bill by indorsement." [5] If the drawee did not accept the bill notice must as a rule be given to the drawer,

> because it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands ; and if the latter has notice that the bill is not accepted, or not paid, he may withdraw them immediately. But if he has no effects in the other's hands, then he cannot be injured for want of notice.[6]

We have seen that the indorsee of a bill or note must show that he has called upon the acceptor or maker for payment before he can call upon his indorser.[7] Similarly in all cases an indorsee must give notice to his indorser of a refusal of a drawee to accept. If he does not the indorser is discharged.[8]

There are several important decisions in the law of partnership. The case of *Fox v. Hanbury* [9] is a leading authority for the rule that, since partners are tenants in common, one partner cannot bring trover against another for the partnership property ; [10] for the rule that, since each partner has power to sell the partnership property, the title of a purchaser from one partner cannot be impeached ; [11] and for the rule that, if a partnership is dissolved by the bankruptcy of one of the partners, the solvent partner may deal with the property and give a good title to a purchaser.[12] That case also makes it clear that, on a dissolution, the right of each partner is a right, not to any specific effects, but to an account, and to the balance found due on taking the account.[13] The case of *Hoare v. Dawes* [14] distinguishes between a joint adventure and a partnership ; and it also shows

it as such, and to whom he pleases : and his direction 'to pay it to such a one,' is a direction 'to pay it to him or his order' ; for he assigns his whole property in it," (1761) 2 Burr. at p. 1223.

[1] Price v. Neal (1762) 3 Burr. 1354. [2] Ibid at p. 1357.

[3] London and River Plate Bank v. Bank of Liverpool [1896] 1 Q.B. at pp. 10-11 *per* Mathew J.

[4] Pierson v. Dunlop (1777) 1 Cowp. at p. 574.

[5] Ibid at pp. 573-574.

[6] Bickerdike v. Bollman (1786) 1 T.R. at p. 410 *per* Buller J.

[7] Above 530.

[8] Blesard v. Hirst (1770) 5 Burr. 2670 ; cp. Goodall v. Doolley (1787) 1 T.R. 712.

[9] (1776) 2 Cowp. 445.

[10] At p. 450, citing Litt. § 323 and Co. Litt. 200 *a*. [11] At p. 448.

[12] Ibid. [13] Ibid 449. [14] (1780) 1 Dougl. 371.

that the liability of a dormant partner was understood and well established.[1] The case of *Rice v. Shute* [2] lays it down that if one of several partners be sued, he must take the objection that the other partners are not joined by a plea in abatement. Any other rule would, as Mansfield showed, be very hard on the creditor.[3]

The law of principal and agent was being elaborated. For instance, the rights of a vendor against an undisclosed principal were defined in the case of *Nelson v. Powell* [4]—but it was not till the decisions of the nineteenth century that the liability of the principal, and the rights of a vendor against the principal and the agent, were completely settled. In the case of *Grove v. Dubois* the nature of a *del credere* commission was defined.[5]

We have seen that it was probably due to Mansfield that control over the development of patent law passed from the Privy Council to the courts ; [6] and that the law was being developed by some of his decisions.[7] The principle which underlies passing off actions was stated by him in the case of *Singleton v. Bolton*.[8] If he said, a person " had sold a medicine of his own under the plaintiff's name and mark, that would be a fraud for which an action would lie." [9] But as yet the law on this topic is rudimentary.

(*b*) The victory won by the common law courts over the court of Admiralty [10] gave those courts jurisdiction over very many of the questions of *Maritime Law*, which, in the sixteenth and early seventeenth centuries, had fallen under the jurisdiction of the court of Admiralty.[11] Mansfield took over many of the principles and rules of European maritime law, which had been applied by that court, adapted them to their new environment in the courts of common law, elaborated them, and gave them a new precision.

Terms were defined more accurately. In the case of *Wilson v. Smith* [12] it was pointed out that the term " average," as used in policies of insurance, might mean either " a contribution to a general loss," or " a particular partial loss." In several cases the term" barratry " was defined. Mansfield pointed out that it was

[1] (1780) 1 Dougl. at p. 372. [2] (1770) 5 Burr. 2611.

[3] " A creditor knows with whom he dealt ; but he does not know the secret partner. He may be non-suited twenty times before he learns them all ; or be driven to a suit in equity for a discovery ' who they are.' It is cruel to turn a creditor round, and make him pay the whole costs of a non-suit, in favour of a defendant who is certainly liable to pay his whole demand," ibid at p. 2613.

[4] (1784) 3 Dougl. 410. [5] (1786) 1 T.R. at p. 115.

[6] Vol. xi 427. [7] Ibid 428-429. [8] (1783) 3 Dougl. 293.

[9] Ibid. [10] Vol. i 556-558 ; vol v 153-154.

[11] See vol. viii 245-273 for some account of the way in which the court of Admiralty dealt with these questions.

[12] (1764) 3 Burr. at p. 1555 ; for average see vol. viii 263-265.

derived from an Italian word which meant cheating.[1] As used in maritime law, it meant "every species of fraud or knavery in the master of a ship by which the freighters or owners are injured."[2] It followed from this definition that it could only be committed by the master or mariners against the owner of the ship. It could not be committed by the owner of the ship, who might "make himself liable by his fraudulent conduct to the owner of the goods, but not as for barratry."[3] In the case of *Caldwell v. Ball* Buller, J., defined a bill of lading as "an acknowledgement under the hand of the captain that he has received such goods, which he undertakes to deliver to the person named in that bill of lading;" and he added that it was assignable by indorsement.[4] The rule that the property in a ship could be transferred by a bill of sale was recognized in the case of *Atkinson v. Maling*.[5] In the case of *Luke v. Lyde*[6] it was held that if there was a loss at sea from any cause not imputable to the fault of the master, freight on the goods saved must be paid in proportion to the part of the voyage which had been performed. Mansfield said:[7]

> I find by the ancientest laws in the world (the Rhodian laws) that the master shall have a rateable proportion, where he is in no fault. And Consolato del Mare, a Spanish book, is also agreeable thereto. Ever since the laws of Oleron it has been settled thus;

and then he cited *Roccius de Navibus* and the Ordinance of Louis XIV to show that they agreed.[8]

In the case of *Wright v. Campbell*[9] Mansfield laid down the principle that the holder or indorsee of a bill of lading can transfer the property in the goods at sea to a *bona fide* purchaser, even though the holder or indorsee is only the factor of the owner.[10] If there were several bills of lading, which were substantially similar, the first person who got one of the bills by a legal title was entitled to the goods.[11]

In the case of *Hotham v. East India Co.*[12] the liabilities of the owner of a ship under a charter-party were defined. He was not an insurer, so that he was not liable for damage caused by the act of God; but he was liable for the damage caused by his

[1] Vallejo v. Wheeler (1774) 1 Cowp. at p. 154.
[2] Lockyer v. Offley (1786) 1 T.R. at p. 259.
[3] Nutt v. Bourdieu ibid 330.
[4] Ibid 216; cp. vol. viii 255-257.
[5] (1788) 2 T.R. at p. 465; cp. vol. viii 246.
[6] (1759) 2 Burr. 882.
[7] At p. 889; for the laws of Oleron see vol. v 120-125; for the Consolato del Mare see ibid 70-71.
[8] At pp. 889-890.
[9] (1767) 4 Burr. 2046.
[10] "The owner can never dispute with the vendees; because the goods were sold *bona fide* and by the owner's own authority," at p. 2051.
[11] Caldwell v. Ball (1786) 1 T.R. 205.
[12] (1779) 1 Dougl. at p. 278; cp. vol. viii 251; see Sutton v. Mitchell (1785) 1 T.R. 19 for some discussion of the statute of 7 George II c. 15 which limited the liability of the owner in case of embezzlement by the master or mariners to the value of the ship and freight.

own fault or that of his servants. If goods were ordered by the captain for the use of a ship both the owners and the captain were liable; but the captain could not be made liable for goods ordered by the owners before his appointment.[1] It was held that a captain, unlike the crew, had no lien on the ship for his wages;[2] and, contrary to the rule formerly laid down in the court of Admiralty,[3] that he had no lien for money spent on repairs to the ship in England. Mansfield was perhaps conscious that the denial of a lien in the latter case was contrary to the rule formerly laid down by the court of Admiralty, and he evidently regretted that the law compelled him to come to this decision.[4]

In the case of *Hamilton v. Davis*[5] Mansfield proved that the supposed rule, that if a ship were wrecked, and no animal came ashore alive, the goods were forfeited, was not and never had been part of the law of England. Neither the common law nor the statute law, he said, gave any ground for thinking that so barbarous a rule had ever existed. He held therefore that if the owner could prove his title he could recover his goods.

Another maritime contract which Mansfield held to be enforceable in a common law court was a ransom contract.[6] A ransom contract is a contract made by a ransom bill. A ransom bill is a bill given by the master of a captured vessel to the captor, in which, in consideration of the release of the ship, the master promises to pay the sum of money specified in the bill. Usually the master left a hostage with the captor, who had a right of action in the court of Admiralty against the master and the ship and cargo if the bill were not paid, and he in consequence was not released.[7] These bills were well known in the latter half of the sixteenth century.[8] They were enforceable in the court of Admiralty by the hostage; and the court of Admiralty in the eighteenth century continued to have a concurrent jurisdiction with the courts of common law.[9] Mansfield

[1] Farmer v. Davies (1786) 1 T.R. 108.

[2] Wilkins v. Carmichael (1779) 1 Dougl. 101; of this rule Mansfield said at p. 105 that "it may have its foundation in policy, and the benefit of navigation; for, as ships may be making profit and earning every day, it might be attended with great inconvenience, if, on a change of captain for misbehaviour, or any other reason, he should be entitled to keep the ship till he is paid."

[3] Vol. viii 247 and n. 1.

[4] 1 Dougl. at p. 105.

[5] (1771) 5 Burr. 2732.

[6] For an excellent history of these contracts see W. Senior, L.Q.R. xxxiv 49-62, on which the following account is based.

[7] Ibid 49-50; see an opinion to this effect given by the attorney-general and the advocate-general in 1764, Calender of Home Office Papers 1760-1765 384-385; the attorney-general said that the ransom money was private property, and that the Crown could not dispose of it by treaty without the consent of the parties, ibid; and the advocate-general said that actions on these bills could be begun either by persons authorized by the hostages, or by the payee of the bill, or by the Crown, ibid 393.

[8] L.Q.R. xxxiv 51; Select Pleas of the Admiralty (S.S.) ii lxvi there cited.

[9] Below 693.

held in the case of *Ricord v. Bettenham*[1] that these contracts were enforceable at common law by an action on the bill, not only at the suit of the hostage, but also at the suit of the captor. In this case the hostage had died, and Mansfield allowed the captor, although he was an alien enemy, to sue. This decision was based partly on the ground that the French and Dutch courts enforced these contracts,[2] and partly, as he said in a later case,[3] on the ground that "it is sound policy, as well as good morality, to keep faith with an enemy in time of war."

But this view did not commend itself to Mansfield's successors who held that, since an alien enemy could not sue in an English court, he could not enforce such a contract.[4] But this reasoning did not prevent the hostage from suing; and an English captor could of course sue in any foreign court, which recognized the validity of these bills. Both these matters were dealt with by the Legislature. In 1782[5] it was enacted that a contract to ransom a ship captured by the enemy should be void; and in 1793[6] privateers were forbidden to ransom any neutral or enemy ship, unless in a case of necessity to be allowed of by the court of Admiralty. In fact, both in France and England[7] it had been recognized that it was impolitic to continue this practice of ransoming ships. As Senior says,[8] "the ransom bill in the hands of privateers had become simply a means of making money, at the expense, it is true, of enemy individuals, but without much reference to national policy." Moreover, it had other disadvantages. The number of prisoners of war was reduced, the crew were left free to continue their commerce with the enemy, and the number of prizes, in which the Crown or the Admiralty had an interest, was diminished.[9] And so ransom bills disappeared in practice, though it is possible that they may be enforceable in a case of necessity, unless prohibited by an Order in Council.[10]

[1] (1765) 3 Burr. 1734. [2] At p. 1741.
[3] Cornu v. Blackburne (1781) 2 Dougl. at p. 648.
[4] Anthon v. Fisher (1795) 2 Dougl. 649 *note*; in the earlier case of Brandon v. Nesbit (1794) 6 T.R. at p. 28, Lord Kenyon C.J. had distinguished the case of Ricord v. Bettenham by saying that in that case the action had not been brought till peace had been concluded; there was a good deal to be said for the point made by Dr. Scott *arg.* that ransom contracts belonged to the Prize jurisdiction and that therefore the court of King's Bench had no jurisdiction, 3 Dougl. at p. 172; with this view Buller and Willes JJ. agreed, ibid at p. 177.
[5] 22 George III c. 25. [6] 33 George III c. 66 § 36; L.Q.R. xxxiv 60.
[7] Ibid 56-57. [8] Ibid 57. [9] Ibid 52.
[10] "The old Act of 1782 was repealed in 1864, and by the Naval Prize Act of the same year power is given to make Orders in Council in relation to any war for prohibiting or allowing, wholly or in certain cases, or subject to any conditions or regulations, the ransoming of any ship or goods taken as prize by any of His Majesty's enemies. The present position as regards the giving of ransom seems therefore to be that it is only illegal when it contravenes such an Order in Council, ibid 61; but, as Senior points out, ibid 62, with the disuse of privateering, the practice of giving ransom bills became in effect obsolete.

We have seen that in the case of *Lindo v. Rodney* [1] Mansfield gave a very valuable history of the Prize jurisdiction of the court of Admiralty.

(*c*) Mansfield's achievement in the sphere of *Marine Insurance* is perhaps the most notable of all his achievements in the sphere of commercial and maritime law. With the help of the continental learning on this topic, and in the light of mercantile usage, he laid down the principles of that modern law which is now codified in the Marine Insurance Act 1906.[2] The following are a few, out of the many illustrations which could be given, of the principles and rules which were stated in their final form, often for the first time, by Mansfield and his fellow judges :—

The contract of insurance is a contract *uberrimae fidei ;* and the reason is that " the special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only." [3] Non-disclosure of these facts will therefore avoid the policy. But " either party may be innocently silent, as to grounds open to both, to exercise their judgment upon." [4] The insured need not tell the underwriter what he knows already or ought to know : [5]

> The question must always be whether there was under all the circumstances at the time the policy was underwritten, a fair representation ; or a concealment ; fraudulent, if designed ; or, though not designed, varying materially the object of the policy, and changing the risque understood to be run.[6]

A concealment, therefore, of a material fact, which the underwriter did not know and could not be supposed to know, or a fraudulent misrepresentation, vitiates the policy. It will equally be vitiated, but for a different reason, if there is a breach of warranty express or implied.

> There is no distinction better known . . . than that which exists, between a warranty or condition which makes part of a written policy, and a representation of the state of the case. When it is part of the written policy . . . it must be strictly performed, as being part of the agreement. . . . But as, by the law of merchants, all dealings must be fair and honest, fraud infects and vitiates every mercantile contract. Therefore, if there is fraud in a representation, it will avoid the policy, as a fraud, but not as part of the agreement.[7]

It followed that, whilst " a representation may be equitably and substantially answered, a warranty must be strictly complied with." [8]

[1] (1782) 2 Dougl. 613 ; vol. i 564, 565 ; below 693-694.
[2] 6 Edward VII c. 41.
[3] Carter v. Boehm (1766) 3 Burr. at p. 1909.
[4] At p. 1910.
[5] Ibid.
[6] At p. 1911.
[7] Pawson v. Watson (1778) 2 Cowp. at pp. 787-788 ; cp. Macdowall v. Fraser (1779) 1 Dougl. at p. 261.
[8] De Hahn v. Hartley (1786) 1 T.R. at p. 345.

Just as the insured need not tell the underwriter what he knows already or ought to know, so he may assume that the underwriter knows the usual risks of the particular voyage against which he insures.

> Everything done in the usual course must have been foreseen and in contemplation, at the time he engaged. He took the risque upon a supposition that what was usual or necessary, would be done. . . . If it is usual to stay so long at a port, or to go out of the way, the insurer is considered as understanding that usage.[1]

On the other hand, if the risk is altered by the fault of the owner or master, the insurer is discharged from his obligation.[2] It is for this reason that an unnecessary deviation avoids the policy ;[3] and if a deviation is defended on the ground that it is necessary "it must be justified both as to substance and manner."[4]

The contract of insurance is a contract of indemnity ; and "the insurer, by the marine law, ought never to pay less, upon a contract of indemnity, than the value of the loss : and the insured ought never to gain more."[5] This rule was made to prevent fraud, "lest the temptation of gain should occasion unfair and wilful losses."[6] Several consequences followed from this fundamental principle : (*a*) Two persons could insure different interests, and each could recover to the full value ;[7] but a person could not effect a double insurance on the same interest and recover double the value of his loss.[8] If there was a double insurance the insured could recover his whole loss from one,[9] and that one could recover a rateable contribution from the other.[10] (*b*) It was only if the loss was total that the insured could recover the whole value of the thing insured ;[11] and the question whether the loss was total, so that the insured had a right to abandon the thing insured, and claim its full value, gave rise to some very difficult questions, more especially in cases when there had been a capture and a recapture. It was settled that, in deciding this question, it did not matter whether

[1] Pelly v. Royal Exchange Assurance Co. (1757) 1 Burr. at p. 348 ; cp. Salvador v. Hopkins (1765) 3 Burr. 1707 where it was held, at p. 1715, "that the understanding of the policy must depend upon the course and usage of the East India trade" ; Noble v. Kennoway (1780) 2 Dougl. at p. 513.

[2] Pelly v. Royal Exchange Assurance Co. (1757) 1 Burr. at p. 347.

[3] Lavabre v. Wilson (1779) 1 Dougl. at p. 291 ; cp. Bond v. Nutt (1777) 2 Cowp. at p. 609.

[4] Lavabre v. Wilson (1729) 1 Dougl. at p. 291.

[5] Hamilton v. Mendes (1761) 2 Burr. at p. 1214.

[6] Godwin v. London Assurance Co. (1758) 1 Burr. at p. 492.

[7] Ibid at p. 495 ; if bottomry and respondentia interest were to be insured they must be specified in the policy, Glover v. Black (1763) 3 Burr. at p. 1401.

[8] Ibid at p. 492. [9] Newby v. Reed (1763) 1 W. Bl. 416.

[10] Godwin v. London Assurance Co. (1758) 1 Burr. at p. 492.

[11] "The insurer runs the risque of the insured, and undertakes to indemnify : he must therefore bear the loss actually sustained ; and can be liable for no more," Goss v. Withers (1758) 2 Burr. at p. 694.

or not the ship had been condemned. What was insured against was capture, and, if that event had happened, the insurer was liable whether or not the ship was condemned.[1] Whether the loss was total so that the insured could abandon, or whether it was partial so that he could not abandon, and only recover the loss sustained, depended upon the circumstances of the case.

> If the voyage is absolutely lost, or not worth pursuing; if the salvage is very high; if further expense is necessary; if the insurer will not engage, in all events, to bear that expense, though it should exceed the value or fail of success; under these and many other like circumstances, the insured may disentangle himself and abandon, notwithstanding there has been a recapture.[2]

On the other hand, if there has merely been a temporary obstruction of the voyage there is no right to abandon, and only the actual loss can be recovered; for

> it is repugnant, upon a contract of indemnity, to recover as for a total loss, when the final court has decided that the damnification, in truth, is an average, or perhaps no loss at all.[3]

(*c*) The rule which settles what amount is recoverable upon a partial loss is a logical deduction from the fact that the contract is a contract of indemnity. In order to arrive at the amount recoverable a comparison must be made between the price for which the goods would have sold if they had arrived undamaged, and the price at which they are sold in their damaged condition. The insured is entitled to the difference so ascertained.[4] This rule follows, as Mansfield pointed out, from the fact that the contract is to indemnify the insured to the amount of the prime cost, or value in the policy:

> If they arrive, but lessened in value through damages received at sea, the nature of an indemnity speaks demonstrably, that it must be by putting the merchant in the same condition (relation being had to the prime cost or value in the policy) which he would have been in if the goods had arrived free from damage; that is, by paying such proportion, or aliquot part of the prime cost, or value in the policy, as corresponds with the proportion, or aliquot part of the diminution in value occasioned by the damage.[5]

(*d*) The contract of insurance is a contract to indemnify against a risk. It follows, first, that if the whole risk, or a definite and severable part of the risk, has not been run, for whatever cause, the foundation of the contract fails wholly or in part, and the whole premium paid, or a proportionate part thereof, must be

[1] Goss v. Withers (1758) 2 Burr. at p. 694.
[2] Hamilton v. Mendes (1761) 2 Burr. at p. 1209.
[3] Ibid at p. 1210.
[4] Lewis v. Rucker (1761) 2 Burr. 1167, at p. 1169.
[5] Ibid at pp. 1172-1173.

returned ; [1] and, secondly, that if the risk insured against has been incurred, there can be " no apportionment or return of the premium afterwards." [2]

The two topics upon which the Legislature took a hand in developing the law were, as we have seen,[3] the topics of wagering policies and the insurance of enemy ships. Though it seemed likely, at the beginning of the century, that the court of Chancery would not enforce wagering policies,[4] the law had been otherwise settled.[5] It therefore became necessary for the Legislature to intervene, and to enact that these policies should be void.[6] The principle of these statutes was approved by Mansfield ; and he was opposed to all attempts to evade them. In the case of *Lewis v. Rucker* [7] he pointed out that a valued policy was very different from a wagering policy ; and that on such a policy the insured need only prove some interest to take it out of the statute ;

> but if it should come out in proof, that a man had insured £2000 and had interest on board to the value of a cable only ; there never has been, and I believe there never will be a determination, that by such an evasion the Act of Parliament may be defeated.[8]

In the case of *Lowry v. Bourdieu* [9] he held that, since a wagering policy was illegal, the insurer could not sue for a return of the premium.[10] We have seen that Mansfield approved of the policy of permitting insurances on enemy ships.[11] He opposed the temporary Act of 1748 which made them illegal ; [12] and he seems never to have altered his opinion as to their expediency ; for he is reported to have said in the case of *Gist v. Mason* [13] that

> it is for the benefit of this country to permit these contracts upon two accounts : the one because you hold the box, and are sure of getting the premiums at least, as a certain profit ; the other, because it is a certain mode of obtaining intelligence of the enemy's designs, and I have known instances of intelligence procured by such methods.

[1] Stevenson v. Snow (1761) 3 Burr. 1237 ; Tyrie v. Fletcher (1777) 2 Cowp. at p. 668.

[2] Ibid. [3] Vol. xi 448 ; below n. 12.

[4] Goddart v. Garratt (1692) 2 Vern. 269 ; Le Pypre v. Farr (1716) ibid 716 ; both cases are cited by J. A. Park, Marine Insurance (1st ed.) 297-298.

[5] In the case of Sadlers Co. v. Badock (1743) 2 Atk. at p. 556 Lord Hardwicke said that " the common law leant strongly against these policies [interest or no interest] for some time, but being found beneficial to merchants, they winked at it."

[6] 19 George II c. 37 § 1 ; 14 George III c. 48 § 1.

[7] (1761) 2 Burr. at p. 1171. [8] Ibid.

[9] (1780) 2 Dougl. 468. [10] At p. 470. [11] Above 470.

[12] 21 George II c. 4 ; a similar temporary Act was passed in 1793, 33 George III c. 27.

[13] This case is reported in 1 T.R. 88 (1786), but the passage cited does not appear in this report ; that passage is taken from J. A. Park, Marine Insurance (1st ed.) 276-277, who cites it from a MS. note of this case ; the argument is substantially the same as that which Mansfield used in Parliament when he opposed the Act of 1748, above 470.

But he never seems to have been quite easy in his mind upon the question whether such contracts were reconcilable with the principles that trading with the enemy was illegal, and that an alien enemy has no *locus standi* in the courts.[1] His successors held that these contracts were not reconcilable with these principles, and that therefore they were illegal and void.[2]

In this, as in the preceding period,[3] marine insurance was by far the most important form of insurance. But both life insurance and fire insurance were becoming more common, and therefore the law as to both these kinds of insurances showed some signs of development. In several cases the rules laid down for the more developed contract of marine insurance were applied to these other two forms of insurance. Thus the rule that they were, like the contract of marine insurance, contracts *uberrimae fidei*, was applied to them;[4] the Legislature intervened to prevent these contracts from being made a cloak for a wager;[5] the rule that there could be no return of the premium if the risk had been run was applied to them;[6] and there are some decisions as to the meaning of the warranty, in a contract of life insurance, that a person was in good health.[7] In one case on a fire policy, the exception in the policy, that the insurers should not be liable if the premises were burnt by "an usurped power," was interpreted;[8] and in another case, arising out of the Gordon riots, the exception that they should not be liable if the premises were burnt by a "civil commotion" was discussed.[9] Policies of fire insurance were not assignable; nor

[1] In the case of Bell v. Gilson (1798) 1 Bos. and Pull. at p. 354 Buller J. said, "when the case of *Gist v. Mason* came on, I more than once conversed with Lord Mansfield on the subject, being desirous of obtaining his opinion on the legality of such insurances. On the legality, however, I never could get him to reason. He often said, that in former times it was considered for the interest of the country to insure enemy's property, and on the persuasion of its being for the interest of the country, he always discountenanced any objection on that head. But he never went beyond the ground of expedience."

[2] The Hoop (1799) 1 Ch. Rob. at pp. 200-202; Potts v. Bell (1800) 8 T.R. 548; Furtado v. Rogers (1802) 3 Bos. and Pull. 191.

[3] Vol. viii 294-298.

[4] Stackpole v. Simon (1779) cited J. A. Park, Marine Insurance (1st ed.) 497—life insurance; ibid 522—fire insurance; cp. Whittingham v. Thornburgh (1690) 2 Vern. 206.

[5] 14 George III c. 48; the title of the Act would seem to imply that it refers only to life insurance; but § 1 enacts that "no insurance shall be made . . . on the life or lives of any person or persons, *or on any other event or events whatsoever*, wherein the person or persons for whose use benefit or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering."

[6] J. A. Park, op. cit. 500-501, 521.

[7] Ross v. Bradshaw (1760) 1 W. Bl. 312; J. A. Park, op. cit. 499-500; from a tale told by Horace Walpole in one of his letters it appears that it was recognized that suicide vacated a life policy; but that an office had been established for life insurances up to £300 though the insured committed suicide, Letters (ed. Toynbee) iii 280.

[8] Drinkwater v. London Assurance Co. (1767) 2 Wils. 363.

[9] Langdale v. Mason (1780) J. A. Park, op. cit. 507-511.

could the insured recover if he had no interest in the premises insured when the insurance was effected, or if his interest had ceased at the time of the loss.[1] But it is clear from the cases, and from Park's book on Insurance,[2] that the law as to these varieties of insurance is as yet rudimentary.

(*d*) We have seen that the law of *Bankruptcy* was developed partly by the Legislature,[3] and partly by the court of Chancery.[4] But the courts of common law assisted in its development, because the Chancellor sometimes sent cases which involved issues of fact to be tried by them. Indirectly, also, cases which arose out of bankruptcies, and involved a consideration of the rights of the assignees of the bankrupt and of third persons, helped to develop many different branches of the law. Some of the cases submitted by the Chancellor to the common law courts were the occasion of elaborate judgments. One illustration is the case of *Worsley v. Demattos*,[5] in which Mansfield made an elaborate survey of the law as to conveyances made in fraud of creditors, and as to fraudulent preferences. Another is the case of *Lavie v. Phillips* [6] in which it was held that a woman, who was carrying on a separate trade in the City of London, could be made a bankrupt. Another is the case of *Cox v. Liotard* [7] in which it was held that a liability under a contract of life insurance was a debt provable in bankruptcy, and therefore discharged by the certificate of discharge. Of the cases arising out of litigation between the assignees of a bankrupt and third persons, which helped to develop different branches of the law, the following are illustrations: the case of *Cooper v. Chitty*,[8] in which the sphere of the action of trover and the definition of a conversion were discussed; the case of *Wright v. Campbell*,[9] in which the rule that the property in goods at sea is transferable by the indorsement of the bill of lading was stated; the case of *Lickbarrow v. Mason*,[10] which is the leading case on the doctrine of stoppage *in transitu;* the case of *Fox v. Hanbury*,[11] in which the effect of the bankruptcy of a single partner and of the firm is discussed; the case of *Grove v. Dubois*,[12] in which the position of a *del credere* agent is discussed. These

[1] Lynch v. Dalzell (1729) 4 Bro. P.C. 431; Sadlers Co. v. Badock (1743) 2 Atk. 554.

[2] Out of the 522 pages of the first edition of J. A. Park's book on Insurance, which was published in 1787, 35 only deal with life and fire insurance; and for many of the propositions he advances in these 35 pages he can cite no cases, but relies on analogies with the law as to marine insurance.

[3] Vol. viii 236-240; vol. xi 445-447.

[4] Vol. i 470-473; vol. viii 241-244; above 281-283.

[5] (1758) 1 Burr. 467.

[6] (1765) 3 Burr. 1776.

[7] (1784) 1 Dougl. 166; J. A. Park, op. cit. 494-495.

[8] (1756) 1 Burr. 20.

[9] (1767) 4 Burr. at pp. 2050-2051.

[10] (1787) 2 T.R. 63; above 491-492.

[11] (1776) 2 Cowp. 445; above 531.

[12] (1786) 1 T.R. 112.

and many other cases illustrate the fact that the working of the bankruptcy laws helped forward the development of many different branches of the common law.

This brief survey of a few of Mansfield's decisions in the spheres of commercial and maritime law, shows that his contemporaries and posterity were right in thinking that his achievement in these spheres was the most considerable of all his achievements. It shows that he succeeded in introducing into English law, and adapting to their new environment, some of the principles and rules of continental commercial and maritime law; that he so adjusted the relations between these principles and rules and mercantile usage, that a due regard was paid both to the establishment of a settled system of law, and to the needs of commerce; and, consequently, that he created and settled many of the basic principles and rules of our modern law.

Quasi-Contract.

We have seen that Mansfield, in the case of *Moses v. Macferlan*,[1] laid down the principles underlying the most important part of the law of quasi-contract—that part which defines the conditions under which an action lies for unjust enrichment; and that it was by means of the action of *indebitatus assumpsit* that these principles were enforced.[2] But though these principles are recognized and enforced in our modern law, though it is due mainly to Mansfield that these principles are recognized and enforced, they have taken a shape different from that which he envisaged. Mansfield, looking rather at the development of the substantive law than at the logical consequences of the form of the action by which he was trying to effect that development, thought that the action of *indebitatus assumpsit* could be used to enforce moral duties,[3] and many of those equitable rights which, in pursuance of his desire to effect some kind of fusion between law and equity,[4] he was not content to leave to the court of Chancery. But just as his view that moral obligation ought to be accounted a valid consideration was negatived by reasoning, which was based upon the logical consequences which flowed from the action of assumpsit, on which the doctrine of consideration was mainly based;[5] so his attempt to use the action of *indebitatus assumpsit* to enforce moral duties and equitable rights, was negatived by reasoning based upon the necessary implications of

[1] (1760) 2 Burr. 1005. [2] Vol. viii 97.

[3] As Professor Winfield has said, Province of the Law of Tort 131, "both in *Moses v. Macferlan* and in later decisions, Lord Mansfield put the theory of quasi-contractual obligation on a highly abstract level."

[4] Below 584-589. [5] Vol. viii 30-33, 36-38.

this form of action.[1] Nevertheless, though the law did not take the shape envisaged by him, his attempts to develop this branch of the law were not without effect; for they made his successors more ready to extend the scope of the action of *indebitatus assumpsit*. But they extended it on lines which were more in harmony with its nature; and so they effected in a different way some of the objects at which he aimed. The history of this episode in that part of the law of quasi-contract which relates to unjust enrichment can be shortly summarized as follows:

We have seen that Mansfield regarded the action of *indebitatus assumpsit* as an equitable action, by which money could be recovered "which, *ex aequo et bono*, the defendant ought to refund," or which he "is obliged by the ties of natural justice and equity" to refund.[2] In the case of *Clarke v. Shee* he called it "a liberal action in the nature of a bill in equity";[3] in the case of *Stevenson v. Mortimer*[4] he said that it was governed "by the most liberal equity"; and in the case of *Straton v. Rastall*, Buller, J. said that the scope of the action had been extended "on the principle of its being considered like a bill in equity."[5] Blackstone agreed with this view, and said that this action was "almost as universally remedial as a bill in equity."[6] But, though Mansfield did succeed in making the action a remedy for many cases in which a defendant had unjustly enriched himself at the expense of the plaintiff, he did not succeed in equating it with the remedial scope of a bill in equity. We shall see that his successors rejected, and rightly rejected, his attempts to give effect to equitable rights in a court of law;[7] and, just as his attempts to reform the doctrine of consideration were rejected by them in favour of principles which flowed logically from the procedural origins of that doctrine in the action of assumpsit,[8] so, in moulding this aspect of the law of quasi-contract, his successors did not lose sight of the fact that the action of *indebitatus assumpsit* was a form of assumpsit. Therefore, when considering whether the action would lie in any given case, they asked themselves whether, in the circumstances of

[1] Below 543-544.

[2] Moses v. Macferlan (1760) 2 Burr. at p. 1012, cited vol. viii. 97.

[3] (1774) 1 Cowp. at p. 199; cp. Jestons v. Brooke (1778) 2 Cowp. 793 where the equitable character of the action and the unconscientious conduct of the plaintiff were the grounds of non-suiting him.

[4] (1788) 2 Cowp. at p. 807.

[5] (1788) 2 T.R. at p. 370.

[6] "But there are other trusts, which are cognizable in a court of law: as deposits, and all manner of bailments; and especially that implied contract, so highly beneficial and useful, of having undertaken to account for money received to another's use, which is the ground of an action on the case almost as universally remedial as a bill in equity," Comm. iii 432; for Blackstone's views as to the relations of law and equity see below 593-594.

[7] Below 595-601.

[8] Vol. viii 34-42.

the case, the law could imply a promise. Thus it was said in the case of *Kelly v. Solari*[1] that the law would imply a promise when money had been paid under a mistake of fact of which the payee was aware, because in such a case it would be unconscientious for him to retain it.[2] But this mode of statement makes the unconscientiousness, not the gist of the action, but only a conclusion from the fact that the payment has been made under a mistake of fact. The gist of the action is the implication of a promise to repay because the payment has been made under such a mistake.[3] It follows that payment under a mistake of fact is not, as Mansfield thought, merely a particular instance of a general principle that any unconscientious receipt of money gives a claim to its repayment, but a circumstance which makes it right for the law to imply a promise to repay. As Lord Sumner has pointed out, the decisions of the nineteenth century prove that " there is no ground for suggesting as a recognizable 'equity' the right to recover money *in personam* merely because it would be the right and fair thing that it should be refunded to the payer." [4]

No doubt the judges were ready to imply a promise to pay in a large number of cases; and I think that their readiness was due largely to the fact that it was obviously just that some effect should be given to the principles stated by Mansfield in the case of *Moses v. Macferlan.*[5] In fact, Professor Winfield is inclined to think that the judges, in basing the right to recover upon the question whether the law will imply a promise, rather than upon the question whether it is just or equitable

[1] (1841) 9 M. and W. 54.

[2] " I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake," ibid at p. 58 *per* Parke B.

[3] Hanbury, Essays in Equity 6.

[4] " With whatever complacency the Court of King's Bench might regard the views expressed in *Moses v. Macferlan* protests were very early made against it in the Common Pleas . . . and in *Miller v. Atlee* (1849) 13 Jur. 431, Pollock C.B. bluntly declared the notion that the action for money had and received was an equitable action to be 'exploded,' and Parke B. sitting by him did not say him nay. . . . There is now no ground left for suggesting as a recognizable 'equity' the right to recover money *in personam* merely because it would be the right and fair thing that it should be refunded to the payer," Sinclair v. Brougham [1914] A.C. at pp. 455-456; cp. Baylis v. Bishop of London [1913] 1 Ch. at pp. 139-140 *per* Hamilton L.J.; *In re* Simms [1934] Ch. at pp. 31-32 *per* Romer L.J.

[5] Thus in the case of Freeman v. Jeffries (1869) L.R. 4 Ex. at p. 199 Martin B. said, " for a long time implied contracts have been admitted into the law, when, a transaction having taken place between the parties, a state of things has arisen in reference to it which was not contemplated by them, but is such that one party ought in justice and fair dealing to pay a sum of money to the other."

or reasonable that the plaintiff should recover, have substituted an artificial test which savours of fiction, for a rational and straightforward test.[1] Therefore he would make the essence of this large group of quasi-contractual obligations, not relationships from which the law will imply a promise, but "the idea of unjust benefit."[2] I do not agree. I think that there is much to be said for the retention of the idea of a contract implied by law. First, this idea preserves the historical connection with the form of action by which redress was given in cases of this kind, and thus ensures a continuous and logical development of legal doctrine, which helps to give precision to the law. Secondly, it gives to the notion of quasi-contract that element of a relationship between the parties, analogous to a contract, which is wanting to such tests as natural justice *aequum et bonum* or unjust benefit. It is true that the judges take such matters as reasonableness, justice, or public policy into consideration, when they determine whether or not the law will imply a promise; but the fact that they base liability upon the implication of some sort of relationship between the parties from which an obligation to pay, analogous to a contractual obligation, can be inferred, and not upon natural justice or reasonableness or public policy, gives a definiteness to the concept of quasi-contractual obligation which distinguishes it from the concept of delictual obligation.[3] Thirdly, and consequently, this idea helps to define the sphere of quasi-contractual obligation. On the one hand, it helps the judges to define more precisely the cases where an action for money had and received will lie: on the other hand, it helps them to distinguish more clearly between a quasi-contractual liability of this kind, and those wider equitable rules which, though they present some analogies, rest upon fundamentally different principles. Let us look at one or two illustrations of the advantages of this more precise definition.

In the case of *Moses v. Macferlan*[4] the vagueness of the principles stated by Mansfield led him into error. It led him to hold that the action of *indebitatus assumpsit* lay to recover money paid under compulsion of legal process. On sufficient grounds of public policy Lord Kenyon, C.J., held that the

[1] Province of the Law of Tort 140.

[2] Ibid 141; Mr. Fifoot is in substantial agreement with this view, Lord Mansfield 245-249.

[3] Professor Winfield admits, Province of the Law of Tort 188, that the difference between delictual and quasi-contractual duty can be found in the "scope of the duty." "In tort it is towards persons generally, in quasi-contract it is towards a particular person"; it is exactly this relationship to a particular person that this idea of a contract implied by law emphasizes.

[4] (1760) 2 Burr. 1005.

action would not lie in such cases;[1] and Eyre, C.J., was of the same opinion.[2] Similarly, the more precise principle has helped the judges to distinguish between money paid under a mistake of fact which is recoverable, and money paid under a mistake of law which is not[3]—a vital distinction which is not clearly drawn by Mansfield in the case of *Moses v. Macferlan*.[4] But the greatest advantage of the settlement of the law on these lines has been the elimination of the misleading parallel between the scope of the action of *indebitatus assumpsit* and the scope of a bill in equity, and the clear differentiation between the principles underlying the legal and the equitable remedies. It is true that, to some extent, the legal and equitable remedies covered the same ground; for, as James, L.J., said in the case of *Rogers v. Ingham*,[5] "the action for money had and received proceeded upon equitable considerations."[6] But the scope of the equitable remedy was wider because it was sometimes based upon fundamentally different principles. In the first place, equity took account of fiduciary relationships ignored by the common law. Though the common law action never lay for money paid under a mistake of law, equity would sometimes give relief when a payment had been made under a mistake of law, if there was a fiduciary relationship between the parties, or some other equity, which made it inequitable for a person who had received money to retain it.[7] In the second place, the machinery of the court of Chancery enabled equity to give a wider remedy for the recovery of money or other property than that given by the courts of common law. The sphere of the actions of detinue and trover were limited to the recovery of property in an ascertained *res*—if "the means of ascertainment"

[1] "If this action could be maintained, I know not what cause of action could ever be at rest. After a recovery by process of law, there must be an end of litigation, otherwise there would be no security for any person," Marriot v. Hampton (1797) 7 T.R. at p. 269.

[2] Phillips v. Hunter (1795) 2 H. Bl. at p. 414.

[3] Milner v. Duncan (1827) 6 B. and C. at p. 677 *per* Bayley J.; cp. Lowry v. Bourdieu (1780) 2 Dougl. at p. 471 *per* Buller J.

[4] He said, 2 Burr. at p. 1012, that the action "lies for money paid by mistake," and draws no distinction between mistakes of fact and mistakes of law.

[5] (1876) 3 C.D. 351.

[6] "When it is treated as the common case of money paid to B under a mistake, the law on the subject was exactly the same in the old Court of Chancery as in the old Courts of Common Law. There were no more equities affecting the conscience of the person receiving the money in the one Court than in the other Court, for the action for money had and received proceeded upon equitable considerations," ibid at p. 355.

[7] "I have no doubt that there are some cases which have been relied on, in which this Court has not adhered strictly to the rule that a mistake in law is not always incapable of being remedied in this Court; but relief has never been given in the case of a simple money demand by one person against another, there being between those two persons no fiduciary relation whatever, and no equity to supervene by reason of the conduct of either of the parties," ibid at pp. 355-356 *per* James L.J.; and see ibid at p. 357 *per* Mellish L.J.

failed the remedy failed.[1] The sphere of the action for money had and received was limited to the cases where the law could imply a contract; and if, as in cases like *Sinclair v. Brougham*,[2] it is legally impossible to imply a contract, this remedy failed.[3] But equity was able to trace and follow the proceeds of property which had become unascertainable as a specific *res*, and, not being fettered by the need to imply a promise, was able, on equitable grounds, fiduciary or otherwise, to give a remedy which the common law could not give. Therefore, as Atkin, L.J., pointed out,[4] it is not true

> to say that every person who can in equity establish a right to have his money or the proceeds of his property restored to him, can, as an alternative, bring an action against the person who has been in possession of such money or proceeds for money had and received; still less that he can always bring trover or detinue.

Mansfield's attempt to develop and reform the law of quasi-contract is closely connected with his attempt to create a fusion between some of the rules of law and equity. With this episode in the history of English law I shall deal in the following section.[5] At this point it is sufficient to point out that it illustrates both the bad and the good results of his attempt to alter radically the relations between law and equity. The results were bad in that they tended to obscure the law by confusing the principles underlying the spheres of legal and equitable remedies. Both the procedure of the courts of common law and its substantive principles were so fundamentally different from the procedure and the substantive principles of the court of Chancery,[6] that the attempt to give effect to equitable rights by means of the common law actions merely obscured the rules as to the competence of these actions. For instance, the "well-meant sloppiness of thought," which, in the opinion of Scrutton, L.J., has characterized the action for money had and received,[7] is largely due to Mansfield's attempt to make its scope co-extensive with that of a bill in equity. On the other hand, the results were good in that they helped to give a much-needed elasticity to

[1] Banque Belge v. Hambrouck [1921] 1 K.B. at p. 335 *per* Atkin L.J.

[2] [1914] A.C. 398.

[3] "It has been settled . . . that an *ultra vires* borrowing by persons affecting to act on behalf of a company or other statutory association does not give rise to any indebtedness either at law or in equity on the part of such company or association. It is not, therefore, open to the House to hold that in such a case the lender has an action against the company or association for money had and received. To do so would in effect validate the transaction so far as it embodied a contract to repay the money lent. The implied promise on which the action for money had and received is based would be precisely that promise which the company or association could not lawfully make," ibid at p. 440 *per* Lord Parker.

[4] Banque Belge v. Hambrouck [1921] 1 K.B. at p. 333.

[5] Below 584-589.

[6] Below 595-599.

[7] Holt v. Markham [1923] 1 K.B. at p. 513.

the principles of the common law. The common law, much to its own advantage, did permanently absorb certain principles which were in their origin equitable. Three important principles, which Mansfield and his fellow judges helped to introduce into the common law, are the doctrine of estoppel by conduct,[1] the doctrine of stoppage *in transitu*,[2] and the rule that there is no right of stoppage *in transitu* against the assignee of the consignee.[3] All these principles were derived from equity, and their rationale is equitable. So, too, some of the limitations upon the generality of the principle *in pari delicto potior est conditio defendentis* were equitable limitations, which were imported by Mansfield into the common law. He said :[4]

> If the act is in itself immoral, or a violation of the general laws of public policy, then the party paying shall not have this action ; for where both parties are equally criminal against such general laws the rule is *potior est conditio defendentis*. But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, etc. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover.

He expressed his astonishment that there was little authority in the reports for this distinction. But it is clear that though there was little or no authority in the common law reports, there was authority in the equity reports.[5] In fact he cited a decision of Lord Talbot that a borrower could recover from a lender interest which he had paid above the legal rate, which depended on this principle.[6] Similarly, the principle that if

[1] Vol. ix 161-162.

[2] Vol. viii 243 ; as Buller J. said in the case of Lickbarrow v. Mason (1787) 2 T.R. at p. 75, " the cases between consignor and consignee have been founded merely on principles of equity, and have followed up the principle of *Snee and Prescot* [(1743) 1 Atk. 245] ; for if a man has bought goods, and has not paid for them, and cannot pay for them, it is not equitable that he should prevent the consignor from getting his goods back again, if he can do it before they are in fact delivered " ; and in advising the House of Lords in the same case (1793) 6 East 21 he said, " the right of stopping *in transitu* is founded wholly on equitable principles which have been adopted in courts of law " ; for the history of this case see above 491-492.

[3] Such an assignee is in the position of a purchaser for value of a legal interest ; as Buller J. said 6 East at p. 36, " to sum up the whole in a very few words, the legal property was in the plaintiff : the right of seizing *in transitu* is founded on equity : no case in equity has ever suffered a man to seize goods in opposition to one who has obtained a legal title, and has advanced money upon them ; but Lord Hardwicke's opinion was clearly against it : and the law, where it adopts the reasoning and principle of a court of equity, never has and never ought to exceed the bounds of equity itself " ; see above 283.

[4] Smith v. Bromley (1760) 2 Dougl. at p. 697 ; cp. Clarke v. Shee (1774) 1 Cowp. at p. 200 ; Browning v. Morris (1778) 2 Cowp. at p. 792 ; Lowry v. Bourdieu (1780) 2 Dougl. at p. 472.

[5] See Drury v. Hooke (1686) 2 Ch. Cas. 176 ; Roberts v. Roberts (1730) 3 P. Wms. at p. 74 ; cp. Hermann v. Charlesworth [1905] 2 K.B. at pp. 133-134.

[6] Bosanquet v. Dashwood (1734) Cases t. Talbot 38, cited 2 Dougl. at p. 698 ; cp. Fitzroy v. Gwillim (1786) 1 T.R. at p. 154.

a conveyance or a contract is made for an illegal purpose, the conveyor or the contracting party may get a reconveyance or have the contract set aside, if nothing has been done in furtherance of that purpose, was an equitable principle,[1] which was taken over by the courts of common law.[2]

These illustrations show that, though Mansfield's attempt to create a fusion between the rules of law and equity failed,[3] it had some beneficial effects upon the common law. It imported new principles into it, which expanded it and modernized it. In fact this survey of the contribution made by Mansfield and the court of King's Bench to the development of the common law, shows that it was this importation of new principles into it, which is the distinguishing mark of his work in many of its departments. As we shall now see, it is this fact which accounts for the great and lasting influence of that work upon the future development of the common law.

(4) *Mansfield's influence on the future development of the common law.*

The breadth of Mansfield's legal learning, and his perception of the changing economic conditions of the age, led him to be more acutely conscious than any other lawyer or statesman of his day, of the deficiencies of the common law. At the same time he had all the English lawyer's traditional reverence for the common law, all the traditional belief in the need to maintain its supremacy, and, consequently, all the traditional consciousness of the sanctity and responsibility of the judicial office. Having this consciousness of the deficiencies of the common law, having the learning and the statesmanship to perceive the appropriate remedies, and holding this traditional creed, it was natural that he should think that the best way of adapting the common law to the needs of a changing age was by means of the decisions of the courts; and it is not surprising that his attempt thus to adapt the common law to new needs should have had a large measure of success. His readiness to import new ideas was seconded by his skill in adapting them to the technical environment of the common law, and by an astonishing foresight of the future trend of legal thought. But it was also natural that, in seeking to accomplish this object, he should have sometimes disregarded settled principles, have gone beyond his authorities, and, in effect, have usurped the functions of the Legislature. That was a fault; but it was a fault on the

[1] Ward v. Lant (1701) Prec. in Ch. 182; Birch v. Blagrave (1755) Ambl. 264.
[2] Hastelow v. Jackson (1828) 8 B. and C. at p. 226 *per* Littledale J.; Taylor v. Bowers (1876) 1 Q.B.D. at pp. 295-296.
[3] Below 595-601.

right side; for it meant that his mind was directed to the task of fitting the common law to face the problems of the future. So successfully did he accomplish this task that he gave the common law a capacity to adapt itself to new conditions, which enabled it to cope successfully with the problems set by the age of reform which was opening at the end of this century. Therefore, in order to understand the nature and extent of Mansfield's influence upon the future development of the common law, we must examine his work from these different points of view.

The views of the lawyers and statesmen of the eighteenth century as to the conditions under which developments of, and reforms in, the law should be made, were very different from the views of the lawyers and statesmen of the nineteenth century. Bentham was as yet only a precocious youth, and the age of extensive law reforms effected by the Legislature on *a priori* principles was yet to come. On the other hand, a purely historical school of lawyers, which aimed at explaining, and sometimes at justifying, the apparently unreasonable rules of past ages, had not yet arisen. These eighteenth-century lawyers and statesmen had some of the characteristics of both these schools. They had some affinities to reformers of the Benthamite persuasion in that, being firmly convinced of the superiority of their own to past ages, they were very ready to reform archaic and barbarous rules in the light of those principles of natural reason and justice, upon the discovery of which they prided themselves.[1] It is for this reason that they were ready to welcome the reform of proved abuses and archaisms, provided that the fundamental principles of the law and the constitution were left untouched. "Blackstone, though an optimist, was not opposed to reasonable changes; Pitt, Burke, and Fox were all of them in different ways reformers."[2] They had some affinities to thinkers of the historical school, in that many of them, being conscious of the need to preserve the heritage of the past, insisted that the developments needed to meet new circumstances ought to be made, not by sweeping statutory changes, but by adaptations and small changes in existing laws as and when the need was proved. This was the attitude of Burke and Blackstone and Mansfield. All of them were opposed to large legislative changes in the law; all of them supported the legislative reforms of proved abuses; and all of them were in favour of the adaptation of the law to the needs of the time by the judicial manipulation of old rules and principles to meet new circumstances.

Both Burke and Blackstone would have been prepared to go

[1] Vol. x 9, 113. [2] Dicey, Law and Opinion (1st ed.) 123.

further in the path of legislative reform than Mansfield. Mansfield, it is true, supported the abolition of the hereditary jurisdictions in Scotland, Hardwicke's marriage Act, the abolition of the right of the servants of peers to the protection of the privilege of Parliament, and the Act for the relief of the Roman Catholics. But, in general, he opposed legislative changes in the law. We have seen that in one of his greatest speeches he opposed the Habeas Corpus Bill of 1758,[1] and that he opposed a bill against bribery at elections on the ground that the common law was sufficient, and that the unnecessary multiplication of statutes was inexpedient.[2] When he was solicitor-general he said in his argument in the case of *Omychund v. Barker*, that "a statute can seldom take in all cases. Therefore the common law that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an Act of Parliament."[3] At the very end of his life, in a short memorandum which he wrote on the suggestion that the jury system should be introduced into Scots law in civil cases, he said: "great alterations in the course of the administration of justice ought to be sparingly made, and by degrees, and rather by the Court than the Legislature."[4] And then he pointed out that to introduce such an institution into Scotland, without the safeguards which accompany it in England, would mean certain failure,[5]—a view which in Lord Campbell's opinion has been proved to be true.[6] But he was very ready—more ready than any of the great lawyers of his day—to reform the law and to adapt it to the needs of the time through the agency of the courts.

Mansfield had, in spite of many temptations to devote himself to a political career, remained faithful to the law. He had an immense reverence for the law, founded upon a thorough knowledge of all that its impartial and enlightened administration means to the state and the individual. Therefore he had very high ideals as to the duty and conduct of a judge. In this respect, indeed, he was in line with the tradition of the

[1] Above 471. [2] Above 474.

[3] (1744) 1 Atk. at p. 33; this statement naturally roused the ire of Bentham, Works vii 311.

[4] Cited Campbell, op. cit. ii 554.

[5] "A great deal of law and equity in England has arisen to regulate the course and obviate the inconveniences which attend this mode of trial. It has introduced a court of equity distinct from a court of law, which never existed in any other country, ancient or modern; it has formed a practice by the courts of law themselves and by Acts of Parliament, bills of exceptions, special verdicts, attaints, challenges, new trials, etc. Will you extend by a general reference all the law and equity now in use in England relative to trials by jury? the objections are infinite and obvious. On the other hand, will you specify particularly what their system should be? the Court of Session and the Judges of England, added together, would find that a very difficult task," ibid ii 554.

[6] Ibid; cp. Sources and Literature of Scots Law (Stair Soc.) i 223-224.

common law from mediæval to modern times. But that reverence for the law, and those ideals as to the duty and conduct of a judge, were never more eloquently expounded than in the famous judgment in which he reversed the outlawry of Wilkes.[1] After holding that the errors alleged by Wilkes's counsel were insufficient to justify a reversal, he went on to point out that it was the duty of the court to see if there were other errors which would justify it. But, lest it should be thought that the court had been in any way influenced by the popular feeling in favour of Wilkes which the case had aroused, he stated, in one of the most eloquent passages to be found in any judgment in the course of English legal history, the traditional view of the common law on these matters :

> But here let me pause. It is fit to take some notice of the various terrors hung out ; the numerous crowds which have attended and now attend in and about the hall . . . and the tumults which have shamefully insulted all order and government. Audacious addresses in print dictate to us, from those they call the people, the judgment to be given now, and afterwards upon the conviction. Reasons of policy are urged, from danger to the kingdom, by commotions and general confusion. Give me leave to take the opportunity of this great and respectable audience, to let the whole world know, all such attempts are vain. Unless we have been able to find an error, which will bear us out, to reverse the outlawry, it must be affirmed. The constitution does not allow reasons of state to influence our judgments : God forbid it should ! We must not regard political consequences, how formidable so ever they might be : if rebellion was the certain consequence we are bound to say *fiat justitia ruat caelum*.

After alluding to the libels, anonymous letters, and even threats of personal violence which he had received, he said :

> No libels, no threats, nothing that has happened, nothing that can happen will weigh a feather against allowing the defendant . . . not only the whole advantage he is entitled to from substantial law and justice, but every benefit from the most critical nicety of form, which any other defendant could claim under the like objection.

Thus he proceeded to point out certain errors which the counsel for Wilkes had overlooked, and reversed the outlawry for these reasons.

A man who held these views as to the administration of justice, and at the same time was fully conscious of the need to develop the law in accordance with the needs of the time, would be likely to think that the best way of effecting these developments was by means of the decisions of the courts. We have seen that he always insisted that the cases must be interpreted in the light of principles ;[2] and that, though rules of

[1] (1768) 19 S.T. at pp. 1111-1114 ; " He leaned back in his chair," says Bowring, " and made the speech which won for him, at the time, so much applause and admiration," Bentham, Works x 45.

[2] Above 152.

law established by a series of cases could not be over-turned,[1] the cases must if possible be so interpreted as to bring them into conformity with those principles. Moreover, he held that rules established by the older cases, which were based upon reasons which no longer applied to modern conditions, could and ought to be disregarded. He acted on this principle in the case of *Taylor v. Horde*, where he tried to prove that since the terms seisin and disseisin, tenure, freehold, and feoffment had lost their old significance, the old reason for allowing a feoffment to have a tortious operation, which diminished the rights of a disseisee, had ceased, so that it ought not and could not now have this operation.[2] He acted on this principle in the famous case of *Perrin v. Blake*,[3] where he tried to reduce the rule in *Shelley's Case* to the level of a rule of construction. He expressly approved of the reasons given by his brother Willes for this conclusion,[4] and therefore of his statement that it was right, whenever possible, to "depart from an old maxim the policy of which has now ceased."[5] He then went on to point out correctly that one of the reasons for the rule was to prevent the tenant cheating his lord out of his feudal dues;[6] to show that the invention of the strict settlement, with the device of trustees to preserve contingent remainders, had created a new situation;[7] and to conclude that there was now no reason to defeat the intention of a testator who had clearly shown the nature of the settlement which he intended to make.[8] He acted on this principle in the case of *Corbett v. Poelnitz*,[9] where he held that a married woman, living apart from her husband and having a separate maintenance, could be sued as a *feme sole*. Having stated the general rule that the contracts of a married woman were void at common law because she could own no property, he said:[10]

> This is the general rule. But then it has been properly said, that as times alter, new customs and new manners arise: these occasion exceptions, and justice and convenience require different applications of these exceptions within the principle of the general rule.

[1] Above 152-153; below 555.
[2] (1757) 1 Burr. at pp. 107-108, 113-114; vol. vii 43-44.
[3] (1770) Collect. Jurid. i 283-322; 4 Burr. 2579; vol. iii 109-110.
[4] Collect. Jurid. i 318.
[5] Ibid at pp. 277-278, cited vol. iii 110 n. 2; at p. 259 he also said, "the maxim itself grew into feudal policy, and the reasons of it are now antiquated. The logicians say *cessante causa cessat effectus*; and surely the lawyer may say 'I will confine an old rule of law within its exact borders and extend it as little as possible.'"
[6] Ibid 319. [7] Ibid. [8] Ibid 318.
[9] (1785) 1 T.R. 5; this decision was overruled by the case of Marshall v. Rutton (1800) 8 T.R. 545.
[10] 1 T.R. at p. 8; "*Quicquid agant homines* is the business of courts, and as the usages of society alter, the law must adapt itself to the various situations of mankind," Barwell v. Brooks (1784) 3 Dougl. at p. 373; Ringsted v. Lady Lanesborough (1783) 3 Dougl. at p. 203; in these cases he said that, just as the older law permitted a wife to sue in the cases of the exile or abjuration of her husband, so the introduction of separate property ought to give rise to a similar permission.

It was the application of these principles to many branches of the common law, by a man who had a profound knowledge of its rules and principles, which enabled Mansfield to develop English law, and to bring it into harmony with modern conditions. We have seen that, by acting on these principles, he effected great and salutary changes in the practice of his court ; [1] that he was always ready to mould the rules of practice and pleading so as to save litigants time and expense ; [2] that he was skilful in moulding the fictions and conventions which governed the procedure of the courts, notably the fictions which centred round the action of ejectment,[3] so as to produce substantial justice ; [4] that he helped to develop the law of evidence on rational lines ; [5] that some of his decisions on points of constitutional law, and notably colonial constitutional law, lay down the basic principles of our modern law ; [6] that his decisions on many questions relating to the criminal law, the land law, contract, and tort, helped to develop or to give precision to existing rules ; [7] and, above all, that he settled the main principles of our modern system of commercial and maritime law.[8] It was Mansfield's readiness to reform and develop English law by this method which won the praise of three such diverse characters as Burke, Charles Butler, and the youthful Bentham. Burke, alluding to his argument in the case of *Omychund v. Barker*, said : [9]

> His ideas go to the growing melioration of the law, by making its liberality keep pace with the demands of justice, and the actual concerns of the world ; not restricting the infinitely diversified occasions of men, and the rules of natural justice, within artificial circumscriptions, but conforming our jurisprudence to the growth of our commerce and of our empire.

Charles Butler said : [10]

> Considering his decisions collectively they will be found to form a unique code of jurisprudence on some of the most important branches of our law ; a system founded on principles equally liberal and just, admirably suited to the genius and circumstances of his age, and happily blending the venerable doctrines of the old law with the learning and requirement of modern times.

Bentham tells us that : [11]

> From the first morning on which I took my seat on one of the hired boards, that slid from under the officers' seats in the area of the King's Bench . . . at the head of the gods of my idolatry, had sitten the Lord

[1] Above 494-499. [2] Above 499-503. [3] Vol. vii 15-16.
[4] Above 494-503. [5] Above 504-510.
[6] Vol. xi 236, 243, 255 ; above 510-513.
[7] Above 513-524. [8] Vol. i 572-573 ; above 524-542.
[9] Report of a Committee to inspect the Lords' Journals relative to the impeachment of Warren Hastings, Works (Bohn's ed.) vi 481.
[10] Reminiscences i 130-131. [11] Works i 247.

Chief Justice. . . . Days and weeks together have I made my morning pilgrimage to the chief seat of the living idol.

So impressed was he that he began a poem to him which never got further than the first two lines :

> Hail, noble Mansfield ! chief among the just,
> The bad man's terror, and the good man's trust.[1]

It was because Mansfield was learned in other systems of law besides the common law that he was able by his decisions to develop and modernize many of the rules and principles of the common law. His knowledge of other systems of law helped him to come to right conclusions as to the correct legal principle to apply to the case before him ; and his knowledge of English law helped him to give to that legal principle a technical form which was in accordance with authority. When authority was scanty or conflicting it was not difficult to do this : when the ground was more completely covered by authority it was more difficult. But it is not always easy to draw the line between these two classes of cases. It is not always easy to distinguish between cases where authority is so scanty and conflicting that the judge's idea of the ideally correct rule can have full scope, and cases where the authority is so abundant and uniform that it must be followed, although it is contrary to the judge's own opinion. Mansfield was aware of this difficulty. " My dear Garrick," he once said, " a judge on the bench is now and then in your whimsical situation between tragedy and comedy ; inclination drawing one way, and a long string of precedents the other." [2] He wished to decide cases upon ideally right principles,[3] but he recognized that established rules ought not to be overturned.[4] As we might expect, he did not always succeed in balancing these conflicting ideals. His knowledge of other bodies of law outside the common law, his knowledge of the history of and authorities for the common law, and his view that it was possible to disregard old rules, if the reason for them had ceased,[5] made it the more difficult for him to strike this balance. It is not therefore surprising that in several

[1] Works x 46. [2] Holliday op. cit. 211. [3] Above 152.

[4] Above 152-153 ; " we must not depart from settled determinations," Trinder v. Watson (1764) 3 Burr. at pp. 1585-1586 ; the rule that if a man devises an estate and conveys it away, the devise is revoked, even though he takes it back by the same instrument, " being now established must be adhered to : although it is not founded upon truly rational grounds and principles, nor upon the intent, but upon legal niceties and subtilty," Roe v. Griffits (1766) 4 Burr. at p. 1960 ; " where we are not tied down by any erroneous opinions, which have prevailed so far in practice that property would be shaken by an alteration of them, arguments of convenience and inconvenience are always to be taken into consideration," Burgess v. Wheate (1757-1759) 1 Eden at p. 230.

[5] Above 553.

instances he gave decisions which were based on principles which he considered, not unjustly, to be right and reasonable, although the weight of authority was in favour of an opposite conclusion. His knowledge of other bodies of law outside the common law enabled him to come to a conclusion as to the right and reasonable principles. His knowledge of the history of and authorities for the common law enabled him so to explain the cases that he was able to satisfy himself that they were not inconsistent with these principles. His view that old rules, the reason for which had ceased, could be disregarded, enabled him to dismiss as worthless the authority upon which those rules rested

It will, I think, be found that in these instances he found what he considered to be the right and reasonable principle in two bodies of law of which he was a master—Scots law and the principles of equity.

Mansfield was a learned Scots lawyer. His earliest practice had been in Scotch appeals to the House of Lords; and in later life his knowledge of Scots law had been matured by his experience in hearing these appeals in the House of Lords. The fact that he was a learned Scots lawyer affected his mind in two ways. In the first place, it made him familiar with the sometimes more reasonable rules of Scots law. In the second place, it helped to give him that distinctive Scotch outlook upon law—that outlook which, as we have seen,[1] led Scotch lawyers to look, not for the appropriate writ, but for the appropriate legal principle, which led them to build up their systems by logical and deductive methods, and not by the empirical inductive English method of decided cases. We have seen that Mansfield always attempted to find the principle appropriate to the decision of the case before him, and that he considered that attention should be paid, not so much to the actual decision in any given case, as to the principle underlying that decision.[2] To a man with this mental outlook it was tempting either to disregard cases which laid down principles which appeared to him to be unreasonable, or to wrest the meaning of cases so as to justify the establishment of reasonable principles. Thus, he found in Scots law a theory of contract which he considered very much more reasonable than the English theory based on consideration. We have seen that in the case of *Pillans v. Van Mierop* [3] he disregarded the English decisions, and put forward a theory of contract which was in substance identical with the theory of Scots law; [4] and that in other cases he wrested the

[1] Vol. xi 15-16. [2] Above 152.

[3] (1765) 3 Burr. 1663; vol. viii 29-30.

[4] Stair, Institutions of the Law of Scotland, Bk. I tit. x § 4, after saying that promises are not provable by witnesses, explains that the reason "is the same that

meaning of the cases to justify his view that a moral obligation was a sufficient consideration.[1] We have seen that in the case of *Taylor v. Horde* [2] he gave a definition of seisin and disseisin which had affinities to the doctrine of Scots law,[3] but which was demonstrably not English law.[4]

Mansfield was also a learned equity lawyer. While he was a law officer of the Crown he had had the leading practice in the court of Chancery. We shall see that during the greater part of the eighteenth century the question of the relations of law and equity to one another was an open question.[5] Most lawyers thought with Hardwicke that law and equity must be kept distinct and separate, and that the courts of law and the court of Chancery, though they must work in partnership, must work each on their separate lines.[6] On the other hand, Mansfield and a few other lawyers thought that it would conduce to the ease of litigants [7] if this separation could so far as possible, be broken down, and if some sort of fusion between the principles of law and equity could be effected. Here again he was probably influenced to some extent by Scots law, where law and equity were administered in the same tribunals. In fact we shall see that the question whether the English system of separate tribunals, or the Scotch system of identical tribunals, was the better, had been the subject of a correspondence between Hardwicke and Kames, of which Mansfield was probably not unaware.[8] Mansfield stated his views on this question in the case of *Burgess v. Wheate*,[9] in which, as we shall see, the line of division between the two schools of thought on this matter was clearly marked ; [10] and he tried to give effect to it, not only in his treatment of the law of quasi-contract [11] but also in several cases with which I

the Roman law gave no action upon naked pactions . . . to prevent the mistakes of parties and witnesses in communings ; so now, when writ is so ordinary, we allow no processes for promises, as a penalty against those who observe not so easy a method " ; thus if the agreement was in writing it was actionable, Stair, op. cit. Bk. I tit. x § 9, even though it was gratuitous, ibid § 10.

[1] Vol. viii 26-29. [2] (1757) 1 Burr. 60 ; above 515, 553.

[3] Mansfield cites Craig, Jus Feudale, Bk. 2, tit. 2 ; it appears from Craig that some jurists thought that seisin must be distinguished from investiture, Bk. 2, 2, 6 (Lord Clyde's Tr. i 372), but others thought that investiture meant delivery of seisin or possession, and was identical with the actual seisin or possession which accompanied it, Bk. 2, 2, 8 ; Craig appears to favour the latter view, Bk. 2, 2, 11-15 ; so that Mansfield was justified in saying (1 Burr. at p. 107) that seisin denoted " the completion of that investiture by which the tenant was admitted into the tenure," and that disseisin must therefore mean " some way or other turning the tenant out of his tenure," see the passage cited vol. vii 43. But it is interesting to note that Craig has been criticized by Scots lawyers, much as Mansfield was by English lawyers ; it has been said that his " *Jus Feudale* is not so much a work of Scots Law as a legal treatise by a Scots lawyer," Sources and Literature of Scots Law (Stair Soc.) i 62, and cp. ibid 33-34, 202-204.

[4] Vol. vii 44. [5] Below 584. [6] Below 584, 596-601.

[7] Below 589-590. [8] Above 260, 262 ; below 600.

[9] (1757-1759) 1 Eden at pp. 215-239.

[10] Below 585-587. [11] Above 542-547.

shall deal later.[1] At this point a single illustration will suffice. He had said in the case of *Burgess v. Wheate* that "whatever would be the rule at law, if it was a legal estate, is applied in equity to a trust estate;"[2] and that "the trust is the estate at law in this court [the court of Chancery] and governed by the same rules in general as all real property is."[3] In conformity with this view, he laid it down in the case of *Perrin v. Blake* "that there is no sound distinction between the devise of a legal estate, and of a trust; and between an executory trust and one executed."[4] It followed that, since in executory trusts the intention governed, it must also govern in the devise of the legal estate. This was a case in which law should follow equity, if the equitable and legal rules were to be kept identical; and he considered that it was desirable to keep them identical for,

> if courts of law will adhere to the mere letter of the law, the great men who preside in Chancery will ever devise new ways to creep out of the lines of law, and temper with equity. This is certain from the proceedings on the statute of uses, which will render the lines of property very dubious and uncertain, by difference in judgment in law and equity, to the much dreaded introduction of uncertainty in landed property, and confusion in the titles of the owners.[5]

It was decisions such as these which gave some point to the invective of Junius;[6] and it was his attempt to fuse the principles of law and equity which led his successors Kenyon and Eldon to depreciate his services to English law.[7] In fact there is no doubt that in these cases Mansfield went beyond the province of the judge and usurped the province of the Legislature. On this matter Bentham, who was, as we have seen, an admirer of Mansfield,[8] spoke truly when in his *Comment on the Commentaries* he said:[9]

> Should there be a Judge who, enlightened by genius, stimulated by honest zeal to the work of reformation, sick of the caprice, the delays, the prejudices, the ignorance, the malice, the fickleness, the suspicious ingratitude of popular assemblies, should seek with his sole hand to expunge the effusions of traditionary imbecility, and write down in their room the dictates of pure and native Justice, let him but reflect

[1] Below 588-589. [2] 1 Eden at p. 223. [3] Ibid at p. 224.
[4] Collect. Jurid. i at p. 321. [5] Ibid at pp. 321-322.
[6] "Instead of those certain, positive rules, by which the judgment of a court of law should invariably be determined, you have fondly introduced your own unsettled notions of equity and substantial justice. . . . The court of King's Bench becomes a court of equity, and the judge, instead of consulting strictly the law of the land, refers only to the wisdom of the court, and the purity of his own conscience," Letter xli, cited vol. i 467 n. 3.
[7] Above 477. [8] Above 554-555.
[9] At p. 214; this work, from which the Fragment on Government was detached and separately published by Bentham, has been edited by C. W. Everett.

that partial amendment is bought at the expense of universal certainty ; that partial good thus purchased is universal evil ; and that amendment from the Judgment seat is confusion.

There is no doubt that Mansfield laid himself open to this sound criticism. But, in estimating his services to English law, we should not allow too great a weight to this one defect in his conduct as a judge. Let us remember, in the first place, that the decisions open to this criticism are few in number by comparison with the large number of decisions in which he succeeded, with universal approval, in modernizing and developing English law. Though several of his decisions were dissented from by his successors, only two were reversed.[1] It is true that his opinion, in the case of *Millar v. Taylor*,[2] that an author, after publication, had a perpetual copyright at common law, was not followed by the House of Lords ; [3] but there was much to be said for his opinion ; [4] and his opinion, that, before publication, an author has a perpetual copyright [5] has been endorsed by the court of Appeal.[6] In the second place, let us remember that the reasonableness of the principles underlying some of his heresies has been endorsed by the Legislature in the nineteenth and twentieth centuries, and by later generations of lawyers—feoffments have ceased to have a tortious operation,[7] the rule in *Shelley's Case* has been abolished,[8] and many lawyers prefer the theory of contract which he outlined in *Pillans v. Van Mierop* to the theory of modern English law.[9] In the third place, let us remember that though he failed, and, as we shall see, rightly failed to effect a fusion between the principles of law and equity,[10] he did succeed in introducing certain equitable principles into the common law, such as the doctrine of estoppel by conduct, which added to its efficiency ; [11] that, though his attempt to extend the sphere of *indebitatus assumpsit* to remedy equitable and moral obligations failed, his decisions helped to develop the law of quasi-contract ; [12] and that his familiarity with equitable principles helped him to

[1] Perrin v. Blake, and Bishop of London v. Ffytche (1782) 3 Dougl. 142, (1783) 2 Bro. P.C. 211 ; vol. i 376.

[2] (1769) 4 Burr. at pp. 2395-2407.

[3] Donaldson v. Becket (1774) 4 Burr. 2408. [4] Vol. vi 378-379.

[5] Mansfield drew a clear distinction between the author's copyright before and after publication, 4 Burr. at pp. 2396-2398.

[6] Re Dickens [1935] 1 Ch. 267, at pp. 286-288 *per* Lord Hanworth M.R., and at pp. 302-306 *per* Maugham L.J. ; note that the reasoning in this case makes the view that, before the Act of Anne, the law recognized a perpetual copyright the more probable, see vol. vi 378-379.

[7] 8, 9 Victoria c. 106 § 4.

[8] The Law of Property Act, 15 George V c. 20 § 131.

[9] Vol. viii 46-48 ; see Lord Wright's paper in the Harv. Law Rev. xlix 1225-1253.

[10] Below 599. [11] Above 548-549. [12] Above 542-543.

create our modern system of commercial law.[1] It was inevitable that Mansfield should have the defects of those unique and remarkable qualities which enabled him to perform such great and lasting services to the law and its administration.

English law has been fortunate in securing, at important turning-points in its history, great judges, who have so moulded its development that it has been made fit to solve the problems of a new age, without any appreciable sacrifice in the continuity of its principles. This continuity has been no small gain to the state and to the law. To the state, because it has helped to preserve the Englishman's traditional reverence for the law, which is a condition precedent to a law-abiding habit. To the law, because it has ensured a logical and scientific development of its principles, which is a condition precedent for the creation of a stable and permanent system. Just as Coke's decisions and books ensured the continuity of the development of the common law amidst all the great changes of the age of the Renaissance, Reformation, and Reception of Roman law;[2] so Mansfield's decisions ensured the continuity of its development amidst all the great changes produced by the industrial revolution, by the ideas propagated by the French Revolution, and by the ideas propagated by Bentham. The fact that English law was able to adapt its principles to the needs of the new age of reform, and yet remained a stable and steadying influence in the life of the nation, was due principally to the influence of Mansfield's work.

Mansfield's Contemporaries and Successors

There are three distinguished lawyers of the latter half of the eighteenth century who, though they never held judicial office in the courts of common law or the court of Chancery, were law officers of the Crown, and made some figure in the House of Commons. The two most distinguished are Fletcher Norton and John Dunning. The third is James Wallace.

Fletcher Norton (1716-1789)[3] was leader of the Northern circuit, and had a large practice in the court of King's Bench. In 1756 he became member for Appleby and in 1761 for Wigan. He was made solicitor-general in 1762. In that capacity he prosecuted Wilkes for publishing the *Essay on Woman* and no. 45 of the *North Britain*. He became attorney-general in 1763. There was a proposal that he should succeed Sir Thomas Clarke as Master of the Rolls, but it came to nothing owing to Northington's opposition.[4] He was dismissed from his office of attorney-general

[1] Above 548. [2] Vol. v 490. [3] D.N.B.
[4] See Walpole, Letters (ed. Toynbee) vi 152.

on the formation of the Rockingham Ministry in 1765. In 1769 he defended in the House of Commons Mansfield's conduct of Wilkes's case, and shortly afterwards was made Chief Justice in eyre of the forests south of the Trent, and a privy councillor. He earned the enmity of Junius by his support of the motion that Luttrell was duly elected.[1] From 1770 to 1780 he was Speaker of the House of Commons. His conduct in the chair was not always dignified, and he was accused by Horne Tooke of gross partiality—a charge which the House resolved to be a scandalous libel. Nor was his conduct pleasing to the Crown. He gave offence by the speech which he made in 1774 on the presentation of a bill for the support of the King's household; by his support of Burke's proposals for economic reform in 1780; and by his support of Dunning's motion as to the increase of the influence of the Crown. He even went so far as to attack North for proposing to appoint Wedderburn to the office of Chief Justice of the Common Pleas, mainly because he wished to obtain that office for himself. It is not surprising that in 1780 North opposed with success his re-election to the office of Speaker. In 1782 he was raised to the peerage with the title of Baron Grantley. This elevation he owed to the rivalry between Rockingham and Shelburne. Shelburne had got a peerage for Dunning without consulting Rockingham, and Rockingham insisted that a peerage must be granted to a nominee of his own.[2] He died in 1789.

Norton was an able advocate; but he was rough in his manners, and unprincipled both as a lawyer and a politician.[3] Hickey tells us [4] that he wrote a vile hand, and

> yet nothing offended him so much as any of it being referred back to him for explanation, and when such a circumstance did occur, he was not sparing of abuse to the messenger, in consequence of which all the attorney's clerks had a great dislike to going near him.

He tells us also [5] that he was "sadly dilatory in business, and had a particular dislike to answering cases, so that it was extremely difficult to get one from him." His rough tongue is illustrated by his celebrated statement that, if he were a judge, he would pay no more attention to a resolution of the House of Commons on a question of law than to a resolution of "a

[1] Letter no. xxxix.

[2] See Wraxall, Historical and Posthumous Memoirs (ed. 1884) ii 258-261.

[3] Horace Walpole describes him as "an excellent bull dog," Letters (ed. Toynbee) v 386, and gives a good illustration of his want of "delicacy and decency," ibid v 399; in 1770 he said that nothing could "exceed the badness of his character even in this bad age," but he thought that he would do less harm as Speaker than anywhere else, as at least he would keep order, ibid vii 354.

[4] Memoirs of William Hickey i 59.

[5] Ibid 60; according to Lord Eldon he was averse, when attorney-general, to giving his opinions in writing, Twiss, Life of Eldon iii 98.

drunken porter." [1] He was an able advocate, but so unscrupulous and inaccurate in his statements of fact, that Mansfield is said to have declared that "he had found it more difficult to prevent injustice being done than with any other person who practised before him." [2] Junius alleged that he took fees from both parties,[3] and the imputation stuck; for he was generally known in the satires of the day by the nickname of Sir Bull-Face Double-Fee. Obviously both Northington and North were right when they refused to appoint him to a high judicial office.

John Dunning (1731-1783) [4] was a friend of Kenyon and Horne Tooke in their student days.[5] He was a member of the western circuit; and in 1762 a fortunate illness of serjeant Glynn, a leader of the circuit, helped to give him his chance.[6] The ability which he showed on that occasion, and also a memorial which he drew up for the East India Company in that year in answer to the complaints of the Dutch East India Company, established his reputation. He was thought by Horace Walpole to be the author of a tract entitled *An Inquiry into the late Doctrine of Libels*, which Walpole considered to be "the finest piece . . . written for liberty since Lord Somers." [7] In 1765 he won fame and popularity by his argument against the legality of general warrants; and in 1768 he became solicitor-general and a member of Parliament. He was a consistent opponent of the policy of the court, and was therefore dismissed from office in 1770. He returned to the bar in his stuff gown, but Mansfield, "in consideration of the office he had holden and his high rank in business," gave him precedence next after the King's counsel, serjeants, and the recorder of London.[8] In Parliament

[1] Junius' Letter no. xxxix; D.N.B.; "had old Onslow been in the Chair," said Horace Walpole, "I believe he would have knocked him down with the mace," Letters (ed. Toynbee) vi 9.

[2] Law and Lawyers (1840) i 188, cited D.N.B.; Twiss, Life of Eldon iii 98.

[3] "This is the very lawyer whom Ben Jonson describes in the following lines :—

'Gives forked council; takes provoking gold,
On either hand, and puts it up.
So wise so grave, of so perplex'd a tongue,
And *loud* withal, that would not wag, nor scarce
Lie still without a *fee*,'"

Letter no. xxxix *note;* cp. Wraxall, op. cit. ii 259; Twiss, Life of Eldon iii 98.

[4] D.N.B.

[5] They used to dine at a little eating house near Chancery Lane for the sum of 7½d. each; Tooke said that he and Dunning gave the girl who waited 1d. each, but that Kenyon "who always knew the value of money sometimes rewarded her with a halfpenny and sometimes with a promise," Stephens, Life of Tooke i 33, cited D.N.B.

[6] Holliday, Life of Mansfield 36-37.

[7] Letters (ed. Toynbee) vi 154; cp. ibid vi 169; the tract was published in 1764.

[8] "Mr. Dunning, late Solicitor-General, appeared on the outside of the Bar in the common ordinary Bar gown. . . . Lord Mansfield, after Mr. Dunning had

he was a consistent opponent of the coercion of America; he supported the bill for the relief of the Roman Catholics; and in 1780 he moved and carried his famous motion that "the influence of the crown has increased, is increasing and ought to be diminished." In 1782 he was made a privy councillor and raised to the peerage as Baron Ashburton. But though he would have been a good Lord Chancellor, the King refused to part with Thurlow; and so he only became Chancellor of the Duchy of Lancaster, and was granted a pension. He died in 1783.

Dunning suffered from great physical defects—an ugly face and figure, and a husky voice.[1] But his ability overcame these defects.[2] Such was the strength and lucidity of his powers of reasoning that he was universally acknowledged to be at the head of the common law and equity bars;[3] and, though his oratory was more suited to the courts than to the House of Commons,[4] he could adapt himself to his audience, and was one of the most effective of the opposition speakers.[5] Since Kenyon, Sir William Jones, Shelburne, and Burke were all agreed as to his abilities, and more especially as to his power of correct reasoning and lucid exposition,[6] it is a matter for regret that he never became Lord Chancellor.

James Wallace was called to the bar by Lincoln's Inn in 1761.[7] In 1763 when Wedderburn, contrary to the professional

made his first motion, addressed himself to him, and declared, that in consideration of the office he had holden, and his high rank in business, he intended for the future (and thought he should thereby injure no gentleman at the Bar) to call to him next after the King's Counsel and Serjeants, and Recorder of London. Mr. Caldecott and Mr. Coxe, the two senior utter barristers present, very readily assented to it; and said they had thought of proposing the same thing themselves," 5 Burr. 2586.

[1] "Never perhaps did nature enclose a more illuminated mind in a body of meaner and more abject appearance. It is difficult to do justice to the peculiar species of ugliness which characterized his person and figure, although he did not labour under any absolute deformity of shape or limb. . . . Even his voice was so husky and choked with phlegm that it refused utterance to the sentiments which were dictated by his superior intelligence," Wraxall, op. cit. ii 39.

[2] Ibid.

[3] "His professional knowledge was universally acknowledged. All parties allowed him to be at the head of the bar. . . . The only doubt was whether he excelled most at Equity or Common Law. There was none as to anybody's coming up to him in either," Shelburne's account of Dunning, Fitzmaurice, Life of Shelburne (2nd ed.), ii 319.

[4] Wraxall, op. cit. ii 39-40.

[5] "His speeches at the bar were sometimes long (in Parliament he was always short), and tried the attention of his hearers, in an age indisposed to close investigation of any sort. . . . It was no want of neatness nor of wit, two qualities which he possessed in such a superior degree that upon many occasions they appeared to be his strength," Fitzmaurice, op. cit. ii 318.

[6] "He could not pass a link in the chain, and had such a faculty of arrangement that he would take an absolute chaos of matter, and return it to you in an instant so clear and distinct, as of itself to present a proper judgment without need of discussion," ibid.

[7] Black Books of Lincoln's Inn iii 372.

etiquette which required a barrister to join a circuit as a junior, joined the northern circuit as a silk, he refused to join the boycott against him.[1] He had his reward. He acquired a leading practice on the northern circuit,[2] and, in 1769, became a bencher of his Inn,[3] and treasurer in 1779.[4] He held the office of solicitor-general from 1778 to 1780, and that of attorney-general from 1780 to 1782. In 1783, during the short-lived coalition ministry, he again held the office of attorney-general.[5] Mrs. Piozzi said that he was a coarse man with a provincial accent, but that his wife was charming.[6] However that may be, his abilities as a lawyer are vouched for by his rival Kenyon.[7] But neither as a lawyer nor as a member of the House of Commons was he so able as Dunning.[8] When he accepted office again in 1783 he was suffering from ill-health,[9] and he died in August of the same year—three months before Dunning. Wraxall tells us[10] that the two lawyers, meeting by accident at an inn at Bagshot,

> both of them conscious that their recovery from the disorders under which they laboured was desperate, expressed a strong mutual wish to enjoy a last interview with each other. For that purpose they were carried into the same apartment, laid down on two sofas nearly opposite, and remained for a long time in conversation. Then they parted as men who could not hope to meet again in this state of existence.

The list of the Chief Justices of the two Benches and of the Chief Barons of the Exchequer will be found at the foot of the page.[11] At this point I must say something, first of the three Chief Barons of the Exchequer, secondly of the two Chief Justices of the Common Pleas of whom I have not yet spoken, and thirdly of Lord Kenyon, the Chief Justice of the King's Bench.

Chief Baron Parker[12] was succeeded in 1772 by Sidney Stafford Smythe (1705-1778).[13] Smythe was called to the bar

[1] Foss, Judges viii 390; Campbell, Chancellors vi 62.
[2] Campbell, Lives of the Chief Justices iii 104.
[3] Black Books of Lincoln's Inn iii 398. [4] Ibid iv 13.
[5] Foss, Judges viii 215, 216. [6] Wraxall, op. cit. i 425 *note*.
[7] In the Dean of St. Asaph's Case (1783) 21 S.T. at p. 874, Kenyon, Chief Justice of Chester, in answer to a statement that Wallace, when attorney-general, had said that the prosecution was not advisable, said, "Nobody will say that Mr. Wallace ever subscribed to such an opinion; and he is second to no man in the profession in point of ability."
[8] "Both were eminent in their profession, but the intellectual superiority lay on the side of Dunning," Wraxall, op. cit. iii 129.
[9] Ibid iii 55-56. [10] Ibid iii 130.
[11]

King's Bench	*Common Pleas*	*Exchequer*
Lord Kenyon 1788-1802.	Lord Camden 1762-1766.	Sidney Smythe 1772-1777.
	John Wilmot 1766-1771.	John Skynner 1777-1787.
	William De Grey 1771-1780.	James Eyre 1787-1794.
	Lord Loughborough 1780-1793.	

[12] Above 133. [13] Foss, Judges viii 369-371; D.N.B.

by the Inner Temple in 1728. He took silk in 1747; and in 1750 was made a baron of the Exchequer. His reputation as a sound lawyer is shown by the fact that he was appointed a commissioner of the Great Seal in 1756 and 1770. He was attacked by Junius because he had, so Junius alleged, browbeat a jury who had found a Scotch serjeant guilty of murder.[1] The fact was that the verdict of the jury was not unanimous, so that he necessarily sent back the jury to reconsider it. This fact was brought out by George Onslow in a debate in the House of Commons on Serjeant Glynn's motion for an enquiry into the administration of criminal justice; and Onslow testified to Smythe's high character in private life and to his competence as a judge.[2] Ill-health forced him to resign in 1777.[3] On his resignation he was made a privy councillor and given a pension of £2,400 a year. He died in 1778. His successor was John Skynner (1723?-1805).[4] Skynner was called to the bar by Lincoln's Inn in 1748; and, on his taking silk and being appointed attorney of the Duchy of Lancaster in 1771, he was called to the bench.[5] He was elected a member of Parliament for Woodstock in 1768 and 1774, and was an effective, though not a frequent speaker. In the debate in 1774 on the bill for the impartial administration of justice in Massachusetts Bay, he intervened to prove to the House that the appeal of murder could not, owing to the rules relating to procedure upon it, be introduced into America; and he took occasion to vindicate Blackstone's Commentaries from aspersions cast upon them in the debate.[6] He delivered the opinion of the judges to the House of Lords in the case of *Rann v. Hughes;*[7] and, if that judgment is his own composition, it shows that he had a command of legal principle, and a power of terse and clear expression. He resigned in 1787, and died in 1805.

His successor James Eyre[8] (1733-1799) was a more considerable lawyer than either of his predecessors. He was a member of St. John's College, Oxford, and was called to the bar by Gray's Inn in 1755. In 1763 he was made Recorder of London.

[1] Letter lxviii.

[2] Parlt. Hist. xvi 1237-1238; it is difficult to say much of either Smythe's or his successor Skynner's qualities as lawyers and Judges since there are no adequate reports of their decisions; he and De Grey C.J. were the only two judges who, in the Exchequer Chamber, agreed with Mansfield's decision in the case of Perrin v. Blake, see W. Bl. 673 *note*.

[3] On one occasion when Smythe was unable to attend his court owing to ill-health, whilst his predecessor Parker, though nearly eighty, was still vigorous, Mansfield is said to have remarked that Smythe should resign to his predecessor, Holliday, Life of Mansfield 464.

[4] Foss, Judges viii 368-369; D.N.B.

[5] Black Books of Lincoln's Inn iii 343, 408.

[6] Parlt. Hist. xvii 1294-1295.

[7] (1778) 7 T.R. 350 *note;* vol. viii 30.

[8] Foss, Judges viii 282-285; D.N.B.

In 1770 he appeared for Wilkes in his action against Wood, and acquired considerable reputation by his argument against the legality of general warrants. But he was no Wilkite. He refused to present the remonstrance to the King which the City had voted in 1770, and gave it as his opinion that a second address in stronger terms was a libel. In 1772 he was made a baron of the Exchequer. He was made Chief Baron in 1787. On Thurlow's dismissal in 1793, he was made chief commissioner of the great seal; and, on Loughborough's appointment as Lord Chancellor, he succeeded him as Chief Justice of the Common Pleas. He presided over that Court till his death in 1799.

Eyre's judgments as Chief Baron and Chief Justice show that he was a good common lawyer, a good equity lawyer, and a good criminal lawyer.

As Chief Baron of the Exchequer he had both an equity and common law jurisdiction; and it is clear that he took the view held by most of the lawyers of the day as to the relations between the rules of law and equity.[1] He did not agree with Mansfield's project of their fusion or partial fusion. It was dangerous, he said, to confound the jurisdiction of these two different sets of courts;[2] and therefore he refused to follow a case decided by Mansfield,[3] and set aside a judgment on the ground that it had been got by usury and extortion. "To set aside judgments of this kind is," he said, "to usurp the office of a court of equity."[4] He recognized that possibilities were assignable in equity;[5] and, when pressed to rule that all idle wagers were void, he pointed out that to take this course was impossible, since "the pleadings upon an issue out of a court of equity are by way of a wager, as being a known ground of legal action."[6] The two most famous of his equity decisions are the cases of *Dering v. Earl Winchelsea*,[7] which deals with the doctrine of contribution as between sureties; and *Dyer v. Dyer*,[8] which is a leading case on the question when a trust of property will result to the person who has paid the purchase money for it. His judgment in the case of *Sutton v. Johnstone*,[9] though it is opposed to that of Lords Mansfield and Lough-

[1] Below 584, 595-601.
[2] Mathews v. Lewis (1792) 1 Anst. at p. 8.
[3] Cook v. Jones (1778) 2 Cowp. 727.
[4] 1 Anst. at p. 8. "The regular process of a Court of Equity seems in every respect the best adapted to this case: the plaintiff is entitled in conscience to the money he has really advanced; if we set aside the judgment, he loses that with the rest: a Court of Equity, on the other hand, decrees what is really due and no more," ibid.
[5] Musprat v. Gordon (1792) 1 Anst. at p. 36.
[6] Micklefield v. Hepgin ibid 134; vol. ix 357.
[7] (1787) 1 Cox 318.
[8] (1788) 2 Cox 92.
[9] (1786) 1 T.R. at pp. 501-510.

borough,[1] is a fine piece of legal reasoning, which found favour with Cockburn, C.J., in the nineteenth century.[2]

We have more elaborate reports of his decisions as Chief Justice than of his decisions as Chief Baron. In the elaborate opinion which he gave to the House of Lords in the case of *Gibson v. Hunter* [3] he explained the meaning of a demurrer to evidence, and the conditions under which this semi-obsolete proceeding was available.[4] His judgment in the case of *Master v. Miller*,[5] as to the effect of an alteration in a bill of exchange upon its validity, has always been accepted as sound law; and his dissenting judgment in the case of *Phillips v. Hunter* [6] is a powerful argument upon a topic of private international law upon which there was then little authority. His decision in the case of *Nicholson v. Chapman*,[7] that one who preserves another's property without being requested to do so, has no lien upon it, has been accepted by the House of Lords. Though his decision in the case of *Waugh v. Carver* [8] that profit-sharing connotes partnership is no longer law, it was regarded as sound law till the decision of the House of Lords in the case of *Cox v. Hickman*.[9] Similarly, though his decision in the case of *Bush v. Steinman*,[10] to the effect that an employer is liable for the torts of an independent contractor, is overruled, it must be remembered that the case was one of first impression, and that Eyre had considerable doubts as to its correctness.[11] His decision in the case of *Dovaston v. Payne*,[12] though it turned on a point of pleading, has been accepted as a leading case upon the rights of the public and the owners of the soil over a common highway.[13] As a judge in criminal cases his ability was shown by his conduct of the trials of Hardy, Horne Tooke, and Thelwall for high treason.

> These trials lasted fourteen days, and throughout them he acted with the greatest patience and impartiality. . . . In his summing up of the evidence in the different cases he carefully described the principles of

[1] Vol. x 385; above 511.
[2] Dawkins v. Lord Paulet (1869) L.R. 5 Q.B. at p. 103.
[3] (1793) 2 H. Bl. at pp. 205-209.
[4] For this proceeding see vol. iii 639; vol. ix 298-299; Eyre C.J. said, 2 H. Bl. at p. 209, "after this explanation of the doctrine of demurrers to evidence, I have very confident expectations that a demurrer like the present will never hereafter find its way into this House."
[5] (1793) 2 H. Bl. at pp. 143-144; cp. Suffell v. Bank of England (1882) 9 Q.B.D. at pp. 560-561.
[6] (1795) 2 H. Bl. at pp. 409-418; cp. Cheshire, Private International Law 383-386.
[7] (1793) 2 H. Bl. at pp. 257-259; cp. Aitchison v. Lohre (1879) 4 A.C. at p. 760 *per* Lord Blackburn.
[8] (1793) 2 H. Bl. at pp. 245-247.
[9] (1860) 8 H.L.C. 268; Lindley, Law of Partnership (8th ed.) 54.
[10] (1799) 1 B. and P. 404.
[11] Vol. viii 479-480.
[12] (1795) 2 H. Bl. at p. 529.
[13] 2 S.L.C. (10th ed.) 161.

the law, and in the most fair and unexceptionable manner explained the bearings of the evidence upon the charges.[1]

Of the two first of the Chief Justices of the Common Pleas during this period—Lord Camden [2] and John Wilmot [3]—I have already given some account. At this point I must say something of their two successors, William De Grey and Lord Loughborough.

De Grey (1719-1781) [4] was called to the bar by the Middle Temple in 1742. He took silk in 1758, entered Parliament in 1761, and became solicitor-general in 1763. In 1766 he succeeded Charles Yorke as attorney-general. He was a steady and effective supporter of the government. In 1769 he supported the view that, since Wilkes had been declared incapable of being elected by the House, Luttrell ought to have been declared to be duly elected.[5] In 1770 he defended ably the legality and the expediency of the power of the attorney-general to file informations ex officio.[6] In the same year, in the debate on the administration of criminal justice, he defended the view taken by the majority of the judges as to the respective provinces of the judge and jury in prosecutions for libel, and the ruling that a publication by a servant was prima facie evidence of the guilt of the master ; [7] and he took the same view as Mansfield of the danger of leaving the question of libel or no libel to an ignorant jury.[8] In 1771 he succeeded Wilmot as Chief Justice of the Common Pleas. Ill-health caused his resignation in 1780. In the year following his services were rewarded by a peerage, with the title of Lord Walsingham. He died in the same year.

His decisions as reported by Blackstone,[9] and his speeches in the House of Commons, show that he was a capable lawyer, and that he could state principles clearly. Three of his notable decisions are *Brass Crosby's Case*,[10] *Scott v. Shepherd*,[11] and *Grace v. Smith*.[12] Eldon said that he was "a most accomplished lawyer,"

[1] Foss, Judges viii 284. [2] Above 304-310. [3] Above 479-482.
[4] Foss, Judges viii 264-266 ; D.N.B. [5] Parlt. Hist. xvi 585-586.
[6] Ibid 1137-1139, 1182-1186, 1194-1195 ; for the history of this procedure see vol. ix 236-245. [7] Parlt. Hist. xvi 1271-1273.
[8] "Much has been said to show that juries ought to judge of law as well as fact ; but surely it would be a strange institution, that required a man to judge about what it is impossible he should know. If shoemakers, bakers and taylors are judges of the law, why should money be wasted in fees to counsel, or why, indeed, should there be any such thing as a lawyer by profession amongst us. Away with your cases, your commentaries, your reports, away with all rules by which that which is determined to be law to-day, will be determined to be law to-morrow," Parlt. Hist. xvi 1185-1186 ; for Mansfield's views see vol. x 692 ; above 513.
[9] Blackstone was one of his puisne judges during his career as Chief Justice.
[10] (1771) 2 W. Bl. 754—a person committed by the House of Commons for breach of privilege cannot be discharged by a writ of habeas corpus during the session of Parliament.
[11] (1773) 2 W. Bl. 892—the difference between trespass and case.
[12] (1775) 2 W. Bl. 999—profit-sharing connotes partnership ; followed in Waugh v. Carver (1793) 2 H. Bl. 235 ; above 567.

and added that he had the most extraordinary memory.[1] He said :

> I have seen him come into court with both hands wrapped up in flannel from gout. He could not take a note and had no one to do so for him. I have known him try a cause which lasted nine or ten hours, and then, from memory, sum up all the evidence with the greatest correctness. I have known counsel interrupt him in his summing up, and represent that he had misstated evidence. " I am right," he would say, " I am sure I am right ; refer to your shorthand writer's notes." He invariably proved to be correct.

He agreed with Mansfield's decision in the case of *Perrin v. Blake ;*[2] with his view that, if money was due in conscience and honour an action of *indebitatus assumpsit* would lie to recover it ;[3] and possibly with his views as to the relation between the rules of law and equity. Eldon tells us that on one occasion he had heard De Grey say that " he never liked equity so well as when it was like law," and that, on a previous day, he had heard Mansfield say that " he never liked law as well as when it was like equity."[4]

De Grey was succeeded by Alexander Wedderburn (1733-1805).[5] Wedderburn was born at Edinburgh. He came of a legal family, and his father was a Scottish judge. He followed the family profession, and showed such ability that he was admitted a member of the faculty of advocates in 1754, at the early age of twenty-one. But for several years before this date he had been attracted by the greater chances which the English bar offered ; and in 1753 he had become a student at the Inner Temple.[6] Though only twenty-one, his name was already known to some of the most distinguished literary men of his own country —to Hume, Robertson, and Adam Smith ; and he had presided over the first meeting of a debating society, known as the Select Society, which included among its members not only eminent literary men, but also leading lawyers and churchmen. He had shown his eloquence and powers as a debater in the General Assembly of the Scottish Church, and his literary ability in the foundation in 1755 of the first and short-lived *Edinburgh Review*. The death of his father in 1756 had somewhat obscured his prospects at the Scottish bar, and his progress there was slow. In spite of, perhaps because of, this fact he had never

[1] Twiss, Life of Eldon i 113.

[2] 1 W. Bl. 673 *note*.

[3] Farmer v. Arundel (1772) 2 W. Bl. at p. 826 ; cp. Fenner v. Meares (1779) ibid at p. 1272.

[4] Dursley v. Fitzhardinge Berkeley (1801) 6 Ves. at p. 260.

[5] Foss, Judges viii 385-398 ; Townsend, Twelve Eminent Judges i 162-238 ; Campbell, Chancellors vi 1-366 ; D.N.B.

[6] In May 1763, when he had become a King's counsel, he joined Lincoln's Inn, Admissions i 453 ; and, in the following month he was made a bencher, Black Books iii 378.

lost sight of his ambition to go to the English bar. But the event which led him to quit the Scottish bar, and seek his fortunes in London, was a scene in court which took place at the end of July or the beginning of August 1757, in the following circumstances: Lockhart, the dean of the faculty and leader of the advocates, was notorious for his rudeness to the younger advocates. Wedderburn and three others agreed that the first of them who suffered from his rudeness should publicly resent it. The lot fell upon Wedderburn whom he had called a presumptuous boy. Wedderburn retorted with a scathing attack upon his learning, his manners, and his domestic life. He was called upon to retract his words and apologize on pain of deprivation. He refused to do either, took off his gown, bowed to the court, and left it, and Scotland—never to return. In November 1757 he was called to the English bar.

It was a bold step. The Scotch were not popular in London and were soon to become even more unpopular. The Scottish accent was ridiculed by Englishmen, and was not wholly pleasing to Scotchmen.[1] Wedderburn had no English friends. All he had to rely upon were a few Scotch friends, his own abilities, and above all his firm determination to succeed. He began by learning to speak English under the tuition of Sheridan and Macklin, and succeeded in eliminating almost entirely all traces of his Scottish accent. He cultivated his Scotch friends, and joined a Scottish literary society. But there is no doubt that the friend to whom he owed most was Bute, who had been a member of the Select Society. Bute introduced him into English society, and in 1760 gave him a Scottish seat in the House of Commons.

Wedderburn had begun to get a small practice; nor was he over-scrupulous in his methods of getting and increasing it.[2] But he was an effective supporter of Bute in the House of Commons; and in 1763 he earned the reward of his political services by being made a King's counsel. On taking silk he joined the northern circuit, from the leadership of which Fletcher Norton had just retired; and he induced Fletcher Norton's clerk, who knew all the attorneys, to enter his service. This step caused great indignation, since no one was allowed to join a circuit except as a junior. The members of the circuit resolved that none of them would hold a brief with him; and he was only saved from the consequences of this boycott by the dissent of Wallace, who, as we have seen,[3] reaped the reward of thus braving the displeasure of the circuit.

[1] See Campbell, *Chancellors* vi 35-38 for the project, advocated by the Select Society, for teaching their countrymen to speak English.

[2] He applied to his countryman Strahan, the famous printer, to use his influence to get him briefs at the Guildhall, ibid 56.

[3] Above 563-564.

In London his chief practice was in the court of Chancery and in Scottish appeals; and in 1769 he won great fame by his speech in the great Douglas cause. But it was to politics rather than to the law that he owed the position which he had already attained; and then and throughout his life it was to politics that he looked for the fulfilment of his ambition to reach the highest place in the legal profession. When Bute retired, he executed the first of his many political tergiversations by becoming a defender of Wilkes and the Americans, and the supporter of the rights of juries in prosecutions for libel. This change in his political allegiance involved the surrender of his seat. But Clive, who was a friend of his younger brother in India,[1] and whom he afterwards ably defended in the House of Commons,[2] not only found him a seat at Bishop's Castle, but presented him with a mansion at Mitcham.

Wedderburn had shown himself to be one of the ablest advocates of the day, both in the courts and in the House of Commons; and he was soon to show that he was able to make himself *persona grata* at court.[3] But he ever kept his own advancement steadily in view; and, though he fought with all his strength and skill in the courts for the cause for which he was retained, and in the House of Commons for the cause to which he had attached himself, he always maintained the attitude of the advocate. As Junius truly said "he never threw away the scabbard nor ever went upon a forlorn hope." He "always treated the King's servants as men, with whom, some time or other, he might possibly be in friendship."[4] Seeing no chance of promotion from his present political connection, he executed the second of his tergiversations, and in January 1771 accepted the office of solicitor-general. Such was his skill in debate that, in spite of his treachery, he recovered his position in the House of Commons;[5] and, together with Thurlow, the attorney-general, was the most effective defender of the policy of the King and Lord North.[6] It was while he was solicitor-general

[1] Townsend, Twelve Eminent Judges i 163.

[2] Ibid 178-179; Lecky, History of England iv 284.

[3] Wraxall, Historical Memoirs ii 57 says, "no man in public life possessed more versatility of talents, or abilities better adapted to every situation. He proved himself as refined a courtier at St. James's as he was an able lawyer at Westminster. His defence of Lord Clive when under accusation before the House of Commons . . . augmented Wedderburn's legal as well as parliamentary reputation. It had been perpetually progressive since that time, and rendered him, whether as a member of the Lower or of the Upper House, one of the most distinguished ornaments of the long robe."

[4] Letter lix.

[5] Junius, writing in April 1771, Letter xliv, says, "yet we have seen him in the house of commons overwhelmed with confusion, and almost bereft of his faculties."

[6] Gibbon says: "the cause of the government was ably vindicated by Lord North. . . . He was seated on the Treasury bench between his Attorney and

that he made the virulent attack upon Franklin which helped to bring on the war with America. It was a brilliant display which delighted the supporters of the policy of coercion; but it shows that Wedderburn's brilliance as an orator and an advocate was accompanied by no tincture of statesmanship.[1] His speech on the trial of the Duchess of Kingston shows that he was as capable of expounding legal principles with force, terseness, and clarity, as of advocating a cause before the House of Commons or the Privy Council.[2] In 1777 he was offered and refused the office of Chief Baron of the Exchequer; and later in the same year he became attorney-general. As attorney-general he gave the opinion which enabled the military to be used without regard to the riot Act, and so stopped the Gordon riots.[3] In 1780 he was made Chief Justice of the Common Pleas and Lord Loughborough.

His charge to the grand jury on the trial of the Gordon rioters[4] has been criticized as wanting in impartiality—but some allowance should be made for the unprecedented period of peril through which London had just gone.[5] In fact, as a judge his demeanour was admirable, though, as we shall see, his learning in the common law was somewhat mediocre.[6] But throughout his judicial career he continued to be a politician whose principal aim was the attainment of the great seal. To the attainment of this object all his efforts were directed, and it prevented him from approaching the problems of the day from the point of view of a statesman. This lack of statesmanship is illustrated by the fact that he suggested the coalition between Fox and North.[7] But when Fox and North came into power, the King refused to make him Chancellor, the seal was put into commission, and he was obliged to content himself with the position of first commissioner.

The fall of the coalition meant for Loughborough a long period of opposition. He allied himself with Fox and the Prince of Wales; and he supported the Prince's claim to the Regency by hereditary right when George III became insane.[8] But for the recovery of the King he would no doubt have then become Chancellor. While in opposition he supported such

Solicitor-General, *magis pares quam similes;* and the minister might indulge in a short slumber, whilst he was upholden on either hand by the majestic sense of Thurlow, and the skilful eloquence of Wedderburn."

[1] For a good description see Lecky, History of England iv 150-152.

[2] (1776) 20 S.T. at pp. 464-481. [3] Wraxall, Historical Memoirs i 246.

[4] It is printed 21 S.T. 486-494. [5] Vol. x 706. [6] Below 575-576.

[7] Lecky, History of England v 210; nor was he more successful in other fields of statesmanship; Wraxall, Historical Memoirs v 194-195, says, "in 1793, when he held the Great Seal and sat in Cabinet, it was universally believed that the siege of Dunkirk, one of the most fatal measures ever embraced by the Allies, originated with Lord Loughborough."

[8] Vol. x 440.

liberal measures as relief for the Roman Catholics and Fox's Libel Act. Thurlow's dismissal in 1792 opened the way for the attainment of his ambition. Taking advantage of the secession of the Whigs, which followed upon the French Revolution, he once more changed his side, and at length obtained the object for which he had so long striven. He became Lord Chancellor in January 1793. As Chancellor he supported all the repressive measures taken by the government, including the ill-advised prosecutions of Hardy and Horne Tooke; and, though he had formerly advocated measures of relief for the Roman Catholics, he now encouraged the King in his opposition to the grant of any measure of Catholic emancipation for Ireland after the passing of the Act of Union. He hoped thus to secure his continuance in office when Pitt resigned. But Pitt's successor Addington dismissed him; and his attempt to remain a member of the Cabinet after his fall was stopped by a letter from Addington which marks a stage in the history of Cabinet government.[1] Neither the King nor anyone else trusted him;[2] and the King had found in Eldon a Chancellor who was more to his mind. To soften his fall he was made Earl of Rosslyn; but though he was assiduous in his attendance at court, and though the King was always courteous to him, he never again held office.[3] He died January 2, 1805.

Wedderburn had many admirable qualities. In Parliament he was an eloquent speaker and a most accomplished debater. As an advocate and a judge he could state the facts of a case with admirable clarity, and explain his view of the law with equal clarity. He was courteous to the bar; "and to those members of it who assisted the profession by their learning, but who failed of success in practice, he was a kind and liberal patron."[4] His love of literature and the drama never left him.[5] Johnson and Shenstone owed their pensions to him, and Gibbon his place at the Board of Trade.[6] We have seen that he intervened to overcome the reluctance of the Benchers of Lincoln's Inn to allow Mackintosh to give his lectures on the law of nature and nations in their hall.[7] He gave liberally to the victims of the French Revolution.[8] But, in spite of these admirable

[1] Vol. x 642-643. [2] Townsend, Twelve Eminent Judges i 214.

[3] It is said that when the King heard of his death he said, "he had not left a greater knave behind him in my dominions"—whether this is true or not is not quite clear, see Campbell, Chancellors vi 334 and *note*, but George III had a long memory and was acute in his judgments of persons, so that it is not improbable.

[4] Foss, Judges viii 397; he is said to have assisted Fearne, Hargrave, and other lawyers, Campbell, Chancellors vi 351-352; Townsend, op. cit. i 235.

[5] Ibid 233-234.

[6] Autobiographies of Gibbon, Memoir E. 320; Foss, Judges viii 397.

[7] Above 82.

[8] Foss, Judges viii 397; Townsend, op. cit. i 235.

qualities, he is one of the least admirable characters amongst the judges and chancellors of England. That it is necessary to pass this severe judgment upon him is due partly to the fact that he subordinated all his talents to his own advancement, and partly to the fact that, as a Scotchman, he never really understood the unwritten conventions of the political society in which he played so conspicuous a part. Because he subordinated all his talents to his own advancement he took the most narrow and short-sighted views of such problems as the American crisis and Catholic emancipation for Ireland, thus forfeiting all claims to statesmanship; and though his talents as a lawyer were not inconsiderable, he relied for his professional advancement on political intrigues rather than on solid learning, so that his reputation as a lawyer is not first rate. Because he never understood the unwritten conventions of the political society in which he played so conspicuous a part, he never realized the effect upon his contemporaries of his political tergiversations. The truth of Junius's terrible dictum that there was something about Wedderburn "which even treachery cannot trust"[1] has been indorsed by many then and later. This dictum is perhaps too severe. There was some truth, more truth than Junius thought, in his earlier statement that some allowances should be made for him because he was a Scotchman.[2] Some allowances should be made, not because, as Junius wickedly said, all Scotchmen are treacherous, but because he hardly realized the effect of his actions upon his reputation, owing to his ignorance of those unwritten laws which governed the political etiquette of the day. He had not been, like Mansfield, "caught young."[3] Just as he saw no harm in disregarding the professional etiquette of the bar when he joined the northern circuit,[4] so he saw no harm in changing his side in politics when it seemed likely to secure his advancement. His gifts as an advocate enabled him to justify to himself, and to the party he was joining, each of these changes; but their accumulated effect was necessarily universal distrust. It was for this reason that, as Butler said,[5] justice was seldom done to his heart or his talents. It is for this reason, as the closing episodes of his life show, that he never realized that his official career was finally closed.

But it is as a lawyer, and at this point as a common lawyer, that we must consider Wedderburn.. Butler said of him:[6]

[1] Letter xlix.

[2] "I speak tenderly of this gentleman, for when treachery is in question, I think we should make allowances for a Scotchman." Letter xliv.

[3] Dr. Johnson "would not allow Scotland to derive any credit from Lord Mansfield; for he was educated in England. Much, said he, may be made of a Scotchman if he be caught young," Boswell, Life of Johnson (Birkbeck Hill's ed.) ii 194.

[4] Above 570. [5] Reminiscences i 133. [6] Ibid i 134.

"his judicial oratory was exquisite. The greatest detractors from his merits acknowledged the perspicuity, the luminous order, and chaste eloquence of his arguments." It is not possible to question the evidence of so able a contemporary; and, indeed, its truth is borne out by the reports. His argument in *The Duchess of Kingston's Case* [1] on the effect of a judgment in the ecclesiastical courts; his judgments in the case of *Grant v. Gould*,[2] which defined the circumstances in which the proceedings or the execution of the sentence of a court martial could be stopped by writ of prohibition; in the case of *Steel v. Houghton*,[3] which negatived the right to glean in a cornfield; in the case of *Compton v. Collinson* [4] as to the position of a married woman separated from her husband—all illustrate his powers of clear and cogent reasoning, and his command of legal principles. Similarly, his judgments in the cases of *Lickbarrow v. Mason*,[5] and *Home v. Earl Camden*,[6] both of which were reversed,[7] are very able arguments for the view of the law which did not prevail. Some of his decisions made important additions to the law. In the case of *Williams v. Millington* [8] he defined the rights of an auctioneer employed to sell goods; in the case of *Coope v. Eyre* [9] he distinguished between a partnership and a joint adventure; and in the case of *Shiells v. Blackburne* [10] he distinguished between the degrees of care which gratuitous bailees and bailees for reward must show. His decision in the case of *Collis v. Emett* [11] is the foundation of the law as to the position of the indorsee of a bill of exchange which has been made payable to a fictitious payee. In the case of *Rudder v. Price* [12] he restated the rule, laid down in the sixteenth century and earlier, that, if a debt is payable by instalments, an action of debt cannot be brought till the last day of payment is past; [13] and in the case of *Rondeau v. Wyatt* [14] he held that § 17 of the Statute of Frauds applies to an executory contract for the sale of goods.

But Butler, though he praised his oratory, and the manner in which he marshalled his arguments, was obliged to admit that he showed a "want of attention to much of what he heard from the bar," and "a want of real taste for legal learning." [15] In

[1] (1776) 20 S.T. at pp. 464-481.
[2] (1792) 2 H. Bl. 69.
[3] (1788) 1 H. Bl. 51.
[4] (1790) 1 H. Bl. 334.
[5] Ibid 357.
[6] Ibid 476.
[7] For the history of the proceedings in the case of Lickbarrow v. Mason see above 491-492; Home v. Earl Camden was reversed by the King's Bench (1791) 4 T.R. 382.
[8] (1788) 1 H. Bl. 81.
[9] Ibid 37.
[10] (1789) 1 H. Bl. 158.
[11] (1790) 1 H. Bl. 313.
[12] (1791) 1 H. Bl. 547.
[13] For the early history of this rule see Y.B. 10 Ed. II Mich. (S.S.) xxiv-xxv.
[14] (1792) 2 H. Bl. 63.
[15] Reminiscences i 134; from this point of view he was inferior, Butler says, to Mansfield, Camden, and Thurlow, ibid.

other words, though he could state the facts of a case, and expound the legal principles which governed it, clearly and well, his political career had left him no time to make any systematic study of the law. Therefore he was sometimes unable to appreciate the force of the arguments addressed to him, and never succeeded in acquiring that intuitive sense as to the right solution of a problem which is the mark of a great lawyer. He was much greater as an advocate than as a lawyer or a judge. Given the facts and the relevant authorities, he could make a good argument; but it was sometimes an argument for the wrong conclusion; and sometimes, though his conclusion was affirmed, it was affirmed on other grounds.[1] A number of his decisions were not followed;[2] some fail to bring out the principles which underlie the branch of law which he is expounding;[3] and some are very meagre. His decisions as Chancellor are more valuable than his decisions as Chief Justice, because his practice had been mainly in the court of Chancery, so that his knowledge of equity was considerably greater than his knowledge of the common law. But his contributions to the development of equity fall outside the period with which I am dealing in this chapter.

Mansfield's successor as Chief Justice of the King's Bench was, as we have seen,[4] Lloyd Kenyon (1732-1802).[5] He was born at Gredington in Flintshire; and, at the age of fourteen, was articled to an attorney named Tomkinson at Nantwich, with whom he always remained on friendly terms.[6] The death of his elder brother enabled him to go to the bar. He was called to the bar by the Middle Temple in 1756. His father could only allow him £80 a year; and during his years of studentship and waiting for business he acquired those penurious habits which he never lost. It was during those years also that he mastered the principles of common law and equity, and acquired that intuitive capacity for reaching the right solution of legal problems by which he was distinguished throughout his professional career. As early as 1753 he began making the reports which were published after his death;[7] and in 1780 the citation of one of

[1] Thus his decision in the case of Folliott v. Ogden (1789) 1 H. Bl. 123 was affirmed, but on a different ground, see (1790) 3 T.R. 726.

[2] E.g. Wallace v. King (1788) 1 H. Bl. 13; Bacon v. Searles (1788) 1 H. Bl. 88; Jackson v. Vernon (1789) 1 H. Bl. 114; Israel v. Douglas (1789) 1 H. Bl. 239; Brooks v. Rogers (1791) 1 H. Bl. 640.

[3] E.g. Jenkins v. Tucker (1788) 1 H. Bl. 90.

[4] Above 476.

[5] Foss, Judges viii 312-317; Townsend, Twelve Eminent Judges i 33-128; Campbell, Chief Justices iii 1-93; George T. Kenyon, Life of Lord Kenyon; the last-mentioned life was written in order to correct Campbell's inaccuracies and bias—just as Theodore Martin's life of Lyndhurst was written to correct the much worse inaccuracies in his life of Lyndhurst in his Lives of the Chancellors; D.N.B.

[6] G. T. Kenyon, op. cit. 13.

[7] Above 134.

his reports in MS. induced Mansfield to have a case argued a third time, and, after hearing that argument, to change his opinion.[1] To Dunning,[2] a friend of his student days, he owed his start in practice. He devilled for him; and his work for Dunning introduced him to a still more influential friend and patron—Thurlow,[3] for whom he, together with Hargrave,[4] performed similar services. His industry and his capacity for rapid and correct decisions on the points of law submitted to him ensured his success. His fee book shows a steady increase from £80 in 1764 to £7,406 3s. 0d. in 1783. The year in which he made his largest income was 1782, in which he made £11,038 11s. 0d., of which 3,020 guineas were for opinions.[5] The fact that his legal abilities were rapidly giving him a place amongst the leaders at the bar is shown by the fact that he refused an offer of a judgeship of the King's Bench in 1778, and of the Common Pleas in 1780.[6] But in that year he accepted the office of Chief Justice of Chester [7]—an office which did not debar him from practice; and in the same year he entered the House of Commons.

Kenyon was never a good speaker either in the courts or in Parliament. He was leading counsel for the defence on the trial of Lord George Gordon; but Gordon's acquittal was due far more to Erskine, his junior counsel, than to Kenyon. So too in the House of Commons, his knowledge of law, his capacity for stating clearly the legal principles applicable to the problem in hand, and his high moral character, procured him respect, but he was never a leading or a popular speaker.[8] He was never really at home either in the House of Commons or later in the House of Lords.[9] It was in the law and not in politics that his strength lay, and he was well aware of this fact.

When he entered Parliament in 1780 he voted with the opposition. In 1782, on the fall of North's government, Thurlow, who had retained his post as Chancellor under Rockingham,

[1] Doe v. Fonnereau (1780) 2 Dougl. at pp. 507-508.
[2] Above 562-563. [3] Above 314-327. [4] Above 410-411.
[5] G. T. Kenyon, op. cit. 22. [6] Ibid 51-52. [7] Ibid 54-55.
[8] "Irascible in his temper, like his countrymen the Welsh, destitute of all refinement in dress or external deportment, parsimonious even in a degree approaching to avarice, he nevertheless more than balanced these defects of deportment and character by strict morality, probity, and integrity. As a member of the House of Commons, whenever he spoke, though he wanted grace and dignity, he could not be reproached with any deficiency in the essential qualities of perspicuity, energy, and command of language," Wraxall, Historical Memoirs ii 265.
[9] "We were colleagues," says Wraxall, "for the borough of Hindon. . . . I know that he reluctantly consented to become a member of the House of Commons, and that he was more than indifferent to his continuance in that assembly," ibid ii 262-263; "so notorious was his aversion to the House of Lords that George III is reported to have said to him at a levée: 'I hear, my lord, that you would rather listen to me than to the Peers,'" G. T. Kenyon, op. cit. 233.

procured his appointment as attorney-general. As attorney-general, and indeed throughout his career, he tried to enforce his own high standards of honesty and economy in the public departments both by precept and example. He supported the Act to prevent offices in the colonies from being executed by deputy ; [1] and, when he was Chief Justice of the King's Bench, he refused to sell the valuable sinecure office of Clerk of Assize which was in his gift, and brought in a bill to abolish it.[2] But his endeavours to make the paymaster to the forces and the treasurer of the navy account for the large balances in their hands did not meet with the approval of Fox, whose father had made his fortune by the use of these balances during the period when he was paymaster to the forces.[3] On Rockingham's death he adhered to the party of Shelburne, and ceased to be attorney-general when the coalition ministry came into power. When Pitt came into power he was reappointed ; and in 1784 he succeeded Sewell as Master of the Rolls. He continued to hold his seat in the House of Commons, and was one of Pitt's chief supporters in the dispute which arose out of the Westminster election. His activities in this contest caused him to be severely handled in the *Rolliad* which was dedicated to him ; [4] but they had no small share in inducing Pitt to pass over Buller, and make him Chief Justice of the King's Bench and a peer on Mansfield's resignation in 1788.[5] We have seen that he never took any great part in the debates in the House of Lords.[6] He opposed, like most of the other judges, Fox's Libel Act. He was a supporter of Hastings and Impey in the House of Commons ; [7] but he was not present on April 23, 1795 when Hastings was acquitted by the House of Lords.[8] He presided over the court of King's Bench till his death on April 4, 1802.

Kenyon was a lawyer and nothing more. He had neither the wide learning nor the charm of manner and speech which characterized Mansfield. He had gained his position by sheer hard work, and by a capacity for arriving at the correct solution of a legal problem, which was due to his genius for law and to his long years of intensive study. His poverty in his early days had made him very penurious. He despised the external trappings of office ; and to the end maintained "all the original coarse homeliness of his early habits." [9] He was impatient of contradiction, and irascible in temper ; and these faults, combined with his stern code of morals, sometimes led him into diffi-

[1] 22 George III c. 75 ; vol. x 523 ; G. T. Kenyon, op. cit. 95-96.
[2] Ibid 232-233. [3] Ibid 90-95, 127 ; Wraxall, op. cit. ii 343-345.
[4] See G. T. Kenyon, op. cit. 157-160 for some extracts.
[5] Above 476. [6] Above 577.
[7] G. T. Kenyon, op. cit. 163. [8] Lords' Journals xl 388.
[9] Wraxall, op. cit. ii 265.

culties. His crusade against gambling on one occasion inspired a caricature by Gilray,[1] and on another occasion led him into a controversy with the Prince of Wales ; [2] and his abhorrence of sexual immorality led him, in actions for criminal conversation and seduction, to lay down some very dubious principles as to power of the court to order a new trial if excessive damages were given,[3] and as to the measure of damages in these cases.[4] His desire to suppress fraud and chicanery in legal proceedings led him to bear hardly, and even cruelly, on the attorneys ; [5] and his impatience of ignorance or incompetence sometimes led him to treat the counsel who practised before him with discourtesy.[6] Nevertheless he was a popular judge. His prejudices were to a large extent popular prejudices, so that juries trusted him, and followed his directions.[7] Litigants liked him because he decided cases quickly and soundly. Everyone, from the King downwards,[8] respected his honesty and high principles. There is much truth in the parallel drawn by Townsend between him and Hale : [9]

> In sanctity of deportment, unspotted integrity, elaborate diligence, and legal erudition, Lord Kenyon may not shrink from comparison with another and greater judge, whose portrait at full length had the place of honour in his dining room at Gredington, the ever memorable Sir Mathew Hale. Like that devout chief justice, he never missed attending church for twenty-six years ; equally with that upright, unswerving lawyer, who owed no man fear or favour, Lord Kenyon was no respecter of persons, and acted on the principle that a gift perverteth the ways of judgment. Like his painstaking predecessor, who made the King's Bench an academy for students, he took pride and pleasure in explaining maxims of law from the judgment seat. Even in their foibles each resembled the other. The sight of students in long periwigs, or attornies with swords, could not have appeared more offensive to Hale, than did all the fopperies or fashion of attire in the eyes of Kenyon ; nor, when he first received a lecture from Baxter for dressing himself too meanly, did he better deserve reproof than his worthy successor. Each was too ascetic in his habits, and over studious of thrift.

As Chief Justice of the King's Bench Kenyon showed the same qualities as he had shown as Master of the Rolls [10]—the

[1] G. T. Kenyon, op. cit. 357. [2] Ibid 357-363.

[3] E.g. in the case of Duberly v. Gunning (1792) 4 T.R. 651 he refused to reduce damages which were obviously, in the circumstances of the case, excessive ; cp. Buller J.'s dissenting judgment ibid at pp. 657-658, which lays down the true principle, which was recognized by Lord Ellenborough C.J. in the case of Chambers v. Caulfield (1805) 6 East at p. 256.

[4] See the remarks of Lord Eldon C.J. cited Campbell, Chief Justices iii 68.

[5] Townsend, op. cit. i 63-65 ; E. B. V. Christian, History of Solicitors 160-162.

[6] Campbell, op. cit. iii 45-46, citing the account of Espinasse who had practised before him. [7] Townsend, op. cit. i 65-66.

[8] " During term time Lord Kenyon often occupied a small house at Marshgate, abutting on Richmond Park, and here the King would come without any notice and stay for several hours, walking up and down the little garden, chatting with the Chief Justice," G. T. Kenyon, op. cit. 282.

[9] Townsend, op. cit. i 116-117. [10] Above 328.

same quickness of decision, the same intuitive readiness to see the right solution of a case, the same conciseness in his opinions, which, as Butler said, sometimes left the reasons for his decisions obscure.[1] "He very seldom wrote a judgment, and very seldom gave many reasons. . . . It is said indeed that at *nisi prius* he never brought a book with him into court to refer to."[2] But Eldon said that he was "the only judge I ever knew who was so constantly right that he could act upon the principle that he was always so";[3] and Ellenborough said that "no man ever hit so often, who always shot flying."[4] He always kept distinct the provinces of the judge and the legislator, and followed precedent, however much he might disagree with the rule established by it—"I cannot," he once said,[5] "set up my judgment against the opinions of Lord Holt and Lord Hardwicke: I yield to the weight of the authorities, but not to the reasoning of them." At the same time he was no blind conservative. He adopted and applied his predecessor's decisions in commercial cases; such decisions as *Pasley v. Freeman*,[6] *Read v. Brookman*,[7] and *Farr v. Newman*[8] show that he appreciated the need for so expounding the law that it was kept in touch with current needs and current morality; and such decisions as *R. v. Higgins*[9] helped to improve the effectiveness of the criminal law. It is true that some of Kenyon's biographers, who wrote at a time when the authority of Adam Smith and the classical political economists was unquestioned, have ridiculed the way in which he enforced the law against forestalling and regrating.[10] But we have seen that there was much to be said for that law;[11] and in fact it would seem that its enforcement in the year 1800, which was a time of scarcity, had salutary results.[12] Very few of his decisions have been dissented from;[13] and in very few cases did his puisne judges differ from the conclusion at which he had arrived.[14] Very many of his decisions

[1] Reminiscences i 136-137. [2] G. T. Kenyon, op. cit. 391.
[3] Cited ibid 390. [4] Cited ibid 391.
[5] Erving v. Peters (1790) 3 T.R. at p. 689; cp. Goodtitle v. Otway (1797) 7 T.R. at p. 415; R. v. Despard (1798) 7 T.R. at p. 743.
[6] (1789) 3 T.R. 51. [7] Ibid 151.
[8] (1792) 4 T.R. 621. [9] (1801) 2 East 5.
[10] R. v. Waddington (1800) 1 East 143, 167. [11] Vol. xi 466, 468, 516.
[12] See a letter from the Marquis of Buckingham to Lord Kenyon cited G. T. Kenyon, op. cit. 374-375.
[13] His decision in the case of R. v. Wright (1799) 8 T.R. 293 is hardly consistent with the later case of Stockdale v. Hansard (1839) 9 Ad. and El. at pp. 121-124 *per* Lord Denman C.J.; and his reasoning in the case of McManus v. Crickett (1800) 1 East 106 is not consistent with the later case of Limpus v. London General Omnibus Co. (1862) 1 H. and C. 526; see also above 579 n. 3.
[14] Buller J. differed in one or two cases which turned upon the question whether the courts of law could give effect to equitable principles, and also in the cases of Farr v. Newman (1792) 4 T.R. at pp. 634-644, above 490-491, and Duberly v. Gunning (1792) 4 T.R. 651, above 579; there was a very important difference of

are recognized as leading cases, which have finally settled important principles of the common law. Let us look at one or two illustrations.

In the sphere of public law the case of *R. v. Lord Abingdon* [1] established the principle that, if a member of the House of Lords or Commons publishes his speech in a newspaper, and the speech contains defamatory matter, he can be prosecuted for libel; the case of *Potts v. Bell* [2] established the principle that all trading with the enemy without the King's licence is illegal; and the case of *Brandon v. Nesbitt* [3] established the principle that no action can be brought by or on behalf of an alien enemy. Moreover, he gave the King sound advice, when he consulted him on the question whether his coronation oath prevented him from assenting to legislation which relieved the Roman Catholics from their disabilities.[4]

Turning to the sphere of private law, some of his decisions in the law of real property settle points which had formerly been controverted, and others contain very clear statements of established principles. The case of *Jones v. Roe* [5] finally settled that a possibility coupled with an interest is devisable; the case of *Ball v. Herbert* [6] settled that the public have no common law right to tow on the banks of navigable rivers; and the case of *Doe v. Lancashire* [7] settled the rule that marriage and the birth of a child, including a posthumous child, revoked a will of land made before marriage. The case of *Webb v. Russell* [8] states clearly the principle that at common law covenants run, not with the land, but with the estate in the land to which they were annexed; and the case of *Doe v. Martin* [9] states the established rules, of which he did not altogether approve, as to the destructibility of contingent remainders. In the law of personal property the case of *Horwood v. Smith* [10] illustrates an important point in the law as to the effect of the sale of stolen goods in market overt; the case of *Davis v. Bowsher* [11] recognizes the banker's lien on his customer's securities for advances made to the customer; and the case of *Penton v. Robart* [12] illustrates the fact that commercial considerations were inducing

opinion between him and the rest of the court as to the definition of fraud in the case of Haycraft v. Creasy (1801) 2 East 92, in which Kenyon was wrong.

[1] (1794) 1 Esp. 226. [2] (1800) 8 T.R. 548. [3] (1794) 6 T.R. 23.

[4] G. T. Kenyon, op. cit. 308-322. [5] (1789) 3 T.R. at pp. 93-94.

[6] Ibid 253. [7] (1792) 5 T.R. 49.

[8] (1789) 3 T.R. at p. 402—"It is not sufficient that a covenant is concerning the land, but in order to make it run with the land, there must be privity of estate between the contracting parties"; vol. iii 158; vol. vii 290-291.

[9] (1790) 4 T.R. at p. 64. [10] (1788) 2 T.R. 750.

[11] (1794) 5 T.R. 488.

[12] (1801) 2 East at p. 90; Kenyon's principles were unfortunately not followed by Lord Ellenborough C.J. in the case of Elwes v. Maw (1802) 3 East at pp. 56-57; vol. vii 284-286.

the courts to construe the law as to fixtures in a manner more favourable to the tenant. In the sphere of commercial law the case of *Master v. Miller* [1] is a leading case on the effect of a material and unauthorized alteration in a bill of exchange after acceptance; and the case of *Brown v. Harraden* [2] settled an important point in the law as to promissory notes. The case of *George v. Clagett* [3] is a leading case as to the rights of a buyer from an undisclosed principal. In the sphere of criminal law the case of *R. v. Topham* [4] has been recognized as a leading case on liability for a libel on a dead person.[5]

Kenyon decided many leading cases in the law of tort and contract. Amongst his notable decisions in the law of tort are *Doulson v. Mathews* [6] which laid down the rule that no action will lie in England for a trespass to land abroad; *Blake v. Lanyon* [7] which laid down the rule that continuing to employ the servant of another person after notice is actionable; the cases of *Ward v. Macaulay* [8] and *Gordon v. Harper* [9] which illustrate the scope of the action of trover; and the case of *Merryweather v. Nixan* [10] which lays down the rule, abolished by the Law Reform (Married Women at Tortfeasors) Act, 1935,[11] that, as between joint tortfeasors, there is no right to contribution. Amongst his notable decisions in the law of contract are *Cooke v. Oxley* [12] in which the question as to whether a person is bound by his promise to keep his offer open for a certain time is settled; *Elsee v. Gatward* [13] which draws the distinction between a non-feasance for which a person is not liable unless there is a consideration, and a misfeasance for which he is liable in tort; *Cutter v. Powell* [14] which defines the conditions under which an action can be brought on a *quantum meruit*; *Morton v. Lamb* [15] which defines the conditions in which a purchaser can sue for the non-delivery of goods; *Hadley v. Clarke* [16] which defines the conditions in which events occurring subsequently to the contract will excuse its performance; *Jennings v. Rundall* [17] which establishes the rule that an infant cannot be made liable on a contract by framing the action in tort; *Marshall v. Rutton* [18] in which the controverted question whether a married woman, who had agreed to live apart from her husband, and had an allowance from him, could be sued as a *feme sole*, was settled in the negative.

[1] (1791) 4 T.R. 320.
[2] Ibid 148.
[3] (1797) 7 T.R. 359.
[4] (1791) 4 T.R. 126.
[5] See R. v. Labouchere (1884) 12 Q.B.D. at p. 322.
[6] (1792) 4 T.R. 503.
[7] (1795) 6 T.R. 221; vol. iv 384.
[8] (1791) 4 T.R. 489; vol. vii 431.
[9] (1796) 7 T.R. 9; vol. vii 431.
[10] (1799) 8 T.R. 186.
[11] 25, 26 George V c. 30.
[12] (1790) 3 T.R. 653.
[13] (1793) 5 T.R. 143.
[14] (1795) 6 T.R. 320; vol. viii 76.
[15] (1797) 7 T.R. 125.
[16] (1799) 8 T.R. 259.
[17] Ibid 335.
[18] (1800) 8 T.R. 545.

In the sphere of quasi-contract Kenyon began the process of restricting the large and vague competence which Mansfield had assigned to the action for money had and received.[1] In the case of *Marriot v. Hampton*[2] he held that no action would lie for money paid by the plaintiff to the defendant under the compulsion of legal process; and in the case of *Exall v. Partridge*[3] he defined the conditions in which money paid by one person for the benefit of another is recoverable—in such cases, as Grose, J., said,[4] the question was whether the payment was such a one as from it the law would imply a promise to repay.

We have seen that the large competence which Mansfield assigned to the action for money had and received was due to his wish to create a fusion between the rules of law and equity. It was one of the means by which he hoped to effect this fusion.[5] Kenyon denied both the possibility and the desirability of creating such a fusion; and his views on this matter have prevailed. In fact, as we shall now see, the final settlement of the relations between law and equity was one of his most important achievements. He settled their relations in accordance with the views of the Chancellors and of the majority of the judges of the courts of common law, and thus set at rest a controversy which had arisen in, and had been constantly recurring throughout, this century.

V

The Relations Between Law and Equity

The growing systematization and elaboration of the rules of equity raised the question of the relation of these rules to the rules of the common law. In the first place, lawyers were beginning to ask whether the English system of administering law and equity in separate tribunals was the best possible system. Henry Home, Lord Kames,[6] a Scotch judge who had

[1] Above 542-543; below 589.
[2] (1799) 8 T.R. 308.
[3] (1797) 7 T.R. 269.
[4] At p. 310; above 543-544.
[5] Above 547; below 589.
[6] D.N.B.; Sir William Scott describes him as "a man of an ingenious and inquisitive turn of mind, and of elegant attainments, but whose disposition did not lead him to err on the side of excessive deference to authority and establishment"; he says later that "his extreme inaccuracy, in what he ventures to state with respect both to the ancient canon law and the modern English law, tends not a little to shake the credit of his representations of all law whatever," Dalrymple v. Dalrymple (1811) 2 Hagg. Con. at pp. 91-92; it may be noted that Blackstone in his early editions, Comm. iii 433, 441, praises his work, but that he cut out his references to it in the eighth edition—perhaps he had become convinced that he was less accurate than he had supposed; cp. Sources and Literature of Scots Law (Stair Soc.) i 252 n. 3.

published a book on equity in 1760,[1] had some correspondence with Hardwicke upon this matter.[2] He advocated the Scottish system, under which law and equity were administered by the same tribunals ; [3] and we shall see that Hardwicke replied to him, and gave reasons for preferring the English system of separate tribunals.[4] In the second place, we have seen that legislation giving courts of law power to give relief against penalties,[5] and power to give lessees relief against forfeiture,[6] and legislation as to the rights of mortgagors and mortgagees,[7] had effected a slight fusion of legal and equitable rules. If the Legislature had pursued this policy, the separation between the rules of law and equity would have been weakened, and some sort of a fusion between some of these rules might have been effected. But these are the only instances in which it pursued this policy. It did nothing to settle the larger question of the relations of law and equity, so that this question was left to be settled by the lawyers.

Upon this question there were, during a considerable part of the eighteenth century, two schools of thought. One school of thought approved the existing system, under which the administration of law and equity was entrusted to separate tribunals acting upon different principles, but working in partnership with one another—equity scrupulously following the law, and then, having ascertained the legal rights of the parties, compelling them to use their legal rights in accordance with its notions of fairness and justice. The other school of thought emphasized the delays, the expense, and the technical complications which resulted from the separation of tribunals and the divergence of the principles upon which they acted ; and it considered that, in the interests of the harmonious development of English law, and in the interest of the litigant, some fusion of the principles and rules applied by these separate tribunals ought to be effected.

Since the Chancellors and the majority of the judges favoured the first of these two schools, the second would hardly have got a hearing, if Mansfield had not supported it, and attempted to enforce its views by his decisions in the court of King's Bench.

[1] Principles of Equity ; for an account of this book see Sources and Literature of Scots Law (Stair Soc.) i 252-254.

[2] See below 600 for Hardwicke's letter to him.

[3] His view was that the objections to the administration of law and equity by the same tribunals could be obviated by an Institute or Digest in which the boundaries of law and equity were clearly marked out ; his book on the Principles of Equity was intended to supply such an Institute, A. F. Tytler, Memoirs of Lord Kames i 327-328.

[4] Below 600.

[5] 4, 5 Anne c. 16 § 13 (R.C. c. 3) ; vol. xi 521.

[6] 4 George II c. 28 §§ 3 and 4 ; vol. xi 593.

[7] 7 George II c. 20 ; vol. xi 593.

The reasons why Mansfield supported it and tried to enforce its views, must be sought in the breadth of his legal learning, in the character of his intellect, and in his desire to modernize and rationalize the principles and rules of English law. We have seen that Mansfield was learned in Scots law, Roman law, and foreign systems of commercial and maritime law, as well as in English common law and equity.[1] We have seen, too, that though he had been educated in England, he had some of those characteristics of the Scottish intellect, which preferred the method of deductive reasoning from general principles, to the inductive method of building up principles from particular instances.[2] It was by this method of reasoning that he had settled the principles of English commercial and maritime law, and had modernized and rationalized many of the rules of the common law. At the same time his extensive Chancery practice under Hardwicke, whose abilities he greatly admired,[3] had impressed upon his mind the fact that the principles of equity were superior to those of the common law in their flexibility and adaptability to modern needs.[4] Therefore he considered that it would be of great service to the common law if some of these equitable principles could be adopted by, and applied in, the common law courts. Such a fusion of legal and equitable principles would, he thought, conduce not only to the ease of the suitor, but also to the development of legal principles on sound and rational lines, and to the uniformity of the rules of English law. Because Mansfield's views on this matter were accepted by some of the puisne judges of his court, and because they were reproduced by Blackstone in his Commentaries, they created a division of opinion in the profession which was not finally settled till the decisions of Mansfield's successor, Kenyon.

The first case in which this division of opinion as to the relations of law and equity was clearly marked was the case of *Burgess v. Wheate*,[5] which was before the courts between the years 1739 and 1759. We have seen that the question in this case, which brought this division of opinion clearly into view, was, to use the words of Henley, L. K.,[6] "whether the *cestuy que trust* dying without heirs, the trust is escheated to the crown, so that the land may be recovered in a court of equity; or whether the trustee shall hold the land for his own benefit."

We have seen that Mansfield held that in such a case the land subject to the trust escheated, upon the broad principle that trusts, unlike uses, must be regarded "as real estates, as the real ownership of the land."[7] He said:[8]

[1] Above 467.
[2] Vol. xi 16; above 556.
[3] Above 254.
[4] Above 260, 463.
[5] (1757-1759) 1 Eden 177.
[6] At p. 239; above 301-302.
[7] At p. 217; above 303.
[8] At pp. 223-224.

The forum where they are adjudged is the only difference between trusts and legal estates. Trusts are here considered as between *cestuy que trust* and trustee (and all claiming by, through, or under them, or in consequence of their estates), as the ownership or legal estates, except when it can be pleaded in bar of the exercise of this right of jurisdiction. Whatever would be the rule of law, if it was a legal estate, is applied in equity to a trust estate. . . . Twenty years ago I imbibed this principle, that the trust is the estate at law in this court, and governed by the same rules in general, as all real property is, by limitation. Everything I have heard, read, or thought of since, has confirmed that principle in my mind.

It is true that the interest of the *c.q.* use did not escheat, and that a lord taking by escheat was not subject to the use.[1] But that was because the principles applicable to the use, which was a mere personal right, differed from those applicable to the trust, which is a proprietary right. The interest of the *c.q. trust*, being a proprietary right, must escheat; and, conversely, if the lord took the land by escheat on the death without heirs and intestate of a sole trustee, he took subject to the trust.[2] On this point he cited Craig to show that the lord taking by escheat takes *tamquam haeres;* [3] and he contended that, if he so takes, he must take, like the heir takes, subject to the trust.

There was much truth in Mansfield's analysis of the difference between the mediæval use and the modern trust. It is true that the former affected only the estate and conscience of the feoffee to uses, whilst the latter affects the property itself.[4] It is true that the former was essentially a personal obligation and analogous to a chose in action, whilst the latter is essentially a real right and analogous to a right of property in a corporeal thing. It is true also that his view that the equitable estate ought to escheat is not unreasonable; and it was, in fact, accepted in substance by the Legislature in 1884.[5] Nevertheless it is clear that Clarke, M.R. and Henley, L.K., who came to the opposite conclusion, interpreted more correctly the law as to escheat, the conditions under which equity could interfere with legal rules, and therefore the relation of equity to law.

Clarke, M.R., pointed out that the rules of equity as to trusts followed the mediæval rules as to uses, "unless there was a reason to the contrary." [6] The rule of equity that, on the death of a *c.q.* use without heirs and intestate, the land did not escheat to the lord, was founded on the legal rule that the land only escheated if it was left without a tenant.[7] Exactly the same principle must apply to the trust. In neither case

[1] At pp. 226-227. [2] At pp. 228-231. [3] At p. 228.
[4] Vol. vii 146. [5] 47, 48 Victoria c. 71; above 303.
[6] 1 Eden at p. 198. [7] At p. 201.

could there be any escheat, because in both cases there is a tenant—the feoffee to uses in the one case, the trustee in the other. "Because the law gives the escheat only for want of a tenant, equity must do the same. If it did not, it would be making law, instead of administering equity." [1] As Jekyll, M.R., had pointed out in an earlier case,[2] equity may relieve against the rigour of the law, "but in no case does it contradict or overturn the grounds and principles thereof." These reasons were assented to and emphasized by Henley, L.K. We have seen that he pointed out that though, as between the trustee and his *c.q. trusts* and those claiming under them, the *c.q. trusts* had an ownership analogous to legal ownership; yet as between the trustee, who was the legal owner, and third persons, strangers to the trust, such as the lord, the legal ownership of the trustee could not be disregarded.[3] He was the legal owner and the tenant of the land, and, as such, subject to the liabilities of legal ownership, and entitled to its privileges.[4] Since he was in possession as tenant there could be no escheat.[5]

We are not at this point concerned with the specific question at issue in this case—the question whether there could be an escheat of an equitable estate.[6] We are concerned with the implications of the arguments used by those who supported or opposed this thesis. The implications of Mansfield's argument are an insistence on the view that the difference between legal and equitable estates is merely a difference of forum,[7] and that the incidents of two should be assimilated. Obviously, if this were true, it would be possible and desirable to recognize the rights belonging to an equitable owner in a court of law. The implications of the arguments of Clarke, M.R., and Henley, L.K., are an insistence on the principles that equity and law are distinct, that equity must follow the law strictly unless there is some reason why it should depart from it in the interests of honesty and fairness, and that therefore the equitable ownership of a *c.q. trust*, based on these departures from the law, must differ from the legal ownership of a trustee. Because equity follows the law, the legal ownership of a trustee could never be disregarded; and to that legal ownership full effect must be given, if there was no one to whom he stood in a fiduciary position.

The case of *Burgess v. Wheate* thus defined the issue between these two schools of thought as to the relations between law and equity; and the decision in that case foreshadowed the result of the conflict. But it was not till the end of the century that

[1] At p. 212. [2] Cowper v. Cowper (1734) 2 P. Wms. at p. 754.
[3] 1 Eden at pp. 250-251, cited above 302. [4] At p. 251.
[5] Ibid. [6] See vol. iii 71-72; above 585. [7] Above 586.

it was finally settled. Mansfield attempted to give effect to his views in the court of King's Bench; he was seconded by some of his puisne judges; and Blackstone reproduced their views in his Commentaries. I must therefore give some account, first of Mansfield's views and of Blackstone's reproduction of those views;. secondly, of the reasons why those views were rejected; and thirdly, of the results of this rejection upon the future relations between, and the future development of, law and equity.

Mansfield's Views and Blackstone's Reproduction of those Views

In the following cases Mansfield and some of his puisne judges gave effect to the view that it was possible and desirable to give effect to equitable rights in a court of law: In the case of *Eaton v. Jaques* [1] Mansfield held that when a lease for years was assigned to a mortgagee, and the mortgage was forfeited at law, the landlord could not bring an action of ejectment against the mortgagee in a common law court, but must sue the mortgagor. In other words, he gave legal effect to the mortgagor's equity of redemption. He said: [2]

> To do justice between men it is necessary to understand things as they really are, and construe instruments according to the intent of the parties. The lessor is a stranger to it. He shall not be injured, but he is not entitled to any benefit under it. Can we shut our eyes and say it was an absolute conveyance? It was a mere security.

In the cases of *Atkins v. Hill* [3] and *Hawkes v. Saunders* [4] he held that an action lay against an executor for a legacy in the common law courts. One reason for the decision was that since the courts of equity had a concurrent jurisdiction with the ecclesiastical courts to enforce the payment of a legacy, the common law courts must have the same jurisdiction.[5] Another reason was the view that the existence of an obligation—legal, equitable, or only moral—was a sufficient consideration for a

[1] (1780) 2 Dougl. 455.

[2] At p. 460; this reasoning was disapproved of by Lord Kenyon C.J. in the case of Westerdell v. Dale (1797) 7 T.R. at p. 312; and in the case of Williams v. Bosanquet (1819) 1 Brod. at B. at p. 263, Dallas C.J. pointed out that Kenyon C.J. disapproved of the decision in Eaton v. Jaques, and said, "it is hardly necessary to add that it did not meet with the approbation of the profession at large at the time."

[3] (1775) 1 Cowp. 284.

[4] (1782) 1 Cowp. 289.

[5] 1 Cowp. at p. 287; these decisions were overruled by Lord Kenyon C.J. in the case of Deeks v. Strutt (1794) 5 T.R. 690; he pointed out that equity could, when it permitted an action for a legacy, see that provision was made for the family—if e.g. the husband recovered a legacy to his wife he could be compelled to settle it; but that a court of law could not make this provision, so that "the whole of this admirable system, which has been founded in the court of equity, will fall to the ground, if a court of law can enforce the payment of a legacy."

promise to pay.[1] In the case of *Weakly v. Bucknell* [2] he held that an agreement for a lease was equivalent to a lease, and so barred the owner's right to bring ejectment. "If the court were to say this ejectment ought to prevail, it would merely be for the sake of giving the court of Chancery an opportunity to undo all again." [3] In the case of *Corbett v. Poelnitz* [4] he held that when a married woman had a separate maintenance, and acted and received credit as a *feme sole*, she was liable as such. We have seen that both Mansfield and Buller in such cases as *Moses v. Macferlan*,[5] *Clarke v. Shee*,[6] and *Straton v. Rastall* [7] attempted to make the action of *indebitatus assumpsit* perform some of the functions of a bill in equity.[8] In the case of *Winch v. Keeley*,[9] Ashhurst, J., said:

> It is true that formerly the courts of law did not take notice of an equity or a trust . . . but of late years it has been found productive of great expense to send the parties to the other side of the Hall; wherever this Court have seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then if this court will take notice of a trust why should they not of an equity? [10]

On these grounds the court proceeded to recognize the purely equitable title of an assignee of a chose in action. Buller, J., was perhaps the most whole-hearted supporter of Mansfield's views on this question. In his dissenting judgment in the case of *Master v. Miller* [11] he said:

> If the plaintiff has justice and conscience on his side . . . the plaintiff shall recover in an action for money had and received. . . . Let us recollect . . . that not only *boni judicis est ampliare jurisdictionem*, but *ampliare justiciam*: and that the common law of the land is the birthright of the subject, under which we are bound to administer him justice without sending to his writ of subpoena, if he can make that justice appear.[12]

There is no doubt that, if Buller had succeeded Mansfield as Chief Justice, instead of Kenyon,[13] the settlement of the relations of law and equity would have been considerably delayed.

The great arguments in favour of this policy of fusion, or partial fusion, of the rules of law and equity were the saving of time and expense to the suitor, and the simplification of the

[1] As to this see vol. viii 27-28.

[2] (1776) 1 Cowp. 473; not followed by Lord Kenyon C.J. in the case of Doe d. Coore v. Clare (1788) 2 T.R. 739.

[3] 1 Cowp. at p. 474.

[4] (1785) 1 T.R. 5; overruled by Lord Kenyon C.J. in the case of Marshall v. Rutton (1800) 8 T.R. 545; a contrary opinion had been intimated by the court of Common Pleas in the case of Lean v. Schutz (1778) 2 W. Bl. 1195, when they held that a woman could not in these circumstances be sued without her husband.

[5] (1760) 2 Burr. 1005.

[6] (1774) 1 Cowp. 197.

[7] (1788) 2 T.R. 366.

[8] Above 543.

[9] (1787) 1 T.R. 619.

[10] At pp. 622-623.

[11] (1791) 4 T.R. 320.

[12] At p. 344.

[13] Above 476.

law. The force of these arguments was admitted and emphasized by Butler. He said : [1]

> In every court the separation of the courts inflicts on every suitor the necessity of determining a preliminary point always of great importance, and sometimes of extreme difficulty—whether his case is to be governed by the rules of law or the rules of equity. But the difficulty does not rest here, as the complainant is often ignorant whether he is to be resisted by a legal or any equitable defence, and must therefore be ignorant to which judicature it is advisable for him to resort.

Then, alluding to Blackstone's suggestion that there would not have been so much need for the equitable jurisdiction of the Chancellor if the common law courts had made more use of writs in *consimili casu*,[2] he said : [3] " Does not this suggest reflections, which, if ably and maturely weighed, might lead to legislative provisions by which the jurisprudence of these courts might be immensely ameliorated ? " Blackstone on this matter of the relation of law to equity, as on other matters,[4] was a whole-hearted supporter of Mansfield's views. But, in order to understand Blackstone's treatment of this subject, it is necessary to make a short digression, and say a few words as to the manner in which he deals with the topic of equity in his Commentaries.

Blackstone was a common lawyer, somewhat critical of equity,[5] and not very familiar with the existing literature of equity. He says : [6]

> Let us next take a brief, but comprehensive, view of the general nature of *equity*, as now understood and practised in our several courts of judicature. . . . As nothing is hitherto extant, that can give a stranger a tolerable idea of the courts of equity subsisting in England, as distinguished from the courts of law, the compiler of these observations cannot but attempt it with diffidence ; those who know them best, are too much employed to find time to write ; and those who have attended but little in those courts, must be often at a loss for materials.

The account which I have given of the literature of equity shows that Blackstone exaggerates the paucity of the materials.[7] And,

[1] Reminiscences i 45.
[2] Comm. iii 52 ; below 595 n. 3 .
[3] Reminiscences i 46 *note*.
[4] Below 723.
[5] In manuscript E, f. 142, of his lectures (for these MSS. see App. IV (4)) he says of the statute of Uses, " By these flimsey contrivances which one shou'd be ashamed to mention seriously the Statute of Uses is evaded, and it is a still greater shame that these evasions have been countenanced and even encouraged by the courts of equity. Which of late have extended their power almost to the total subversion of the common law built on the wisdom of ages, and substituted in its room the sense and opinion of the single person who happens to preside in them " ; and then in a note on the opposite page he says : " The only service to which this Statute of Uses is now consigned is in giving efficacy to certain new, idle, and secret species of conveyances, introduced in order to render transactions of this sort as private as possible and to save ourselves the Trouble of making the livery of seisin the security of which abundantly overpaid the trouble of going to the land."
[6] Comm. iii 429.
[7] Above 179-193.

though he was familiar with the Chancery practice, procedure, and pleading, of which he gives a good and clear account, he had not studied the authorities for the substantive rules of equity in anything like the same detail as he had studied the authorities for the substantive rules of other parts of English law. Consequently his treatment of equity suffers from two great defects. In the first place, he uses the term equity in two different senses, and he is not always careful to distinguish between them. In the second place, when dealing with the equity administered by the court of Chancery, he adopts and puts into literary form Mansfield's views; and therefore he gives us an account of equity and its relation to the law which was highly speculative when he wrote it, and is positively misleading in the light of the subsequent development of equitable and legal doctrine.

(1) *Blackstone uses the term equity in two different senses, and he is not always careful to distinguish between them.*

It has often been pointed out that Blackstone makes contradictory statements about equity.[1] In his first volume, he says that "there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to positive law";[2] and, in his third volume, he says that "equity is a laboured connected system, governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may be liable to objection."[3] The explanation of this inconsistency is, I think, as follows: When Blackstone is speaking of equity in his first volume he is not thinking of equity as a body of rules administered by the court of Chancery. He is thinking of equity in the very different sense of a method of interpreting laws in accordance with their reason and spirit. This is clear if we look at the paragraph which precedes the sentence cited from the first volume. It runs as follows:

> From this method of interpreting laws, by the reason of them, arises what we call *equity;* which is thus defined by Grotius, "the correction of that, wherein the law (by reason of its universality) is deficient." For since in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed. And these are the cases, which according to Grotius, "*lex non exacte definit, sed arbitrio boni viri permittit.*"[4]

Then follows the sentence cited as to the impossibility of laying down fixed rules and precepts of equity. Moreover, in a later

[1] Vol. i 468; cp. A. F. Tytler, Memoirs of Lord Kames i 347-350.
[2] Comm. i 62. [3] Ibid iii 432. [4] Ibid i 62.

passage in the first volume, Blackstone added to and altered his text in his fourth edition, in order to indicate that this use of the term equity is not the same as the use of it to mean the body of rules administered in the court of Chancery.[1] In the earlier editions he said :

> What equity is, and how impossible in its very essence to be reduced to stated rules, hath been shown in the preceding section. I shall therefore only add, that there are courts of this kind established for the benefit of the subject.

In the fourth and later editions he said :

> What equity is, and how impossible in its very essence to be reduced to stated rules, hath been shown in the preceding section. I shall therefore only add, that (besides the liberality of sentiment with which our common law judges interpret acts of parliament, and such rules of the unwritten law as are not of a positive kind) there are also peculiar courts of equity established for the benefit of the subject.

Blackstone was warranted in using the term " equity " in the sense of a reasonable interpretation of law ; and he was justified in holding that the common law recognized and applied this sort of equity. At the beginning of the sixteenth century the Student, in the *Doctor and Student*, recognized that, by the common law, statutes ought to be equitably construed ; and he contrasted this equity with the equity administered by the chancellor.[2] Later in that century Plowden, in a long note to the case of *Eyston v. Studd*,[3] explained how, in the interpretation of statutes, equity was employed to give them an enlarged or a restrictive construction, in order to make them square with the intent of the Legislature. It is obvious that for this sort of equity it is, and always has been and must be, true to say, that " there can be no established rules and fixed precepts laid down without destroying its very essence." The construction to be placed on a statute depends on the meaning which, having regard to the part of the legal system to which the statute is related, the Legislature must have intended to be placed upon the words which it has used in the particular statute.

I think, therefore, that Blackstone can be defended from the charge of contradicting himself. But it must be admitted that he has helped to bring this charge upon himself by a method of

[1] Comm. i 199 n. 4 (Hammond's ed.).

[2] " Of this term *equity*, to the intent that is spoken of here [i.e. the equity administered by the court of Chancery], there is no mention made in the law of *England ;* but of an equity derived upon certain statutes mention is made many times, and often in the law of *England ;* but that equity is all of another effect than this," Doctor and Student Bk. I chap. xvii ; for instances given by the Student of this equitable construction of statutes, see ibid chap. xvi.

[3] (1574) Plowd. Rep. 465-468.

statement which is not characterized by his usual clarity and accuracy of expression. In his chapter in the third volume, on the equity administered in the court of Chancery, he remarks that he has "formerly touched upon it [equity], but imperfectly," [1] thus leading the reader to suppose that the equity which he has described in connection with the interpretation of statutes is much the same thing as the equity administered by the court of Chancery which he is now about to describe. And then he increases the confusion in his succeeding paragraph, in which he not only ignores the distinction between the two meanings of the term, but even goes so far as to deny that there is any substantial distinction in the English legal system between law and equity. He says:

> Equity then, in its true and genuine meaning, is the soul and spirit of all law: *positive* law is construed, and *rational* law is made, by it. In this, equity is synonymous to justice; in that, to the true sense and sound interpretation of the rule. But the very terms of a court of *equity*, and a court of *law*, as contrasted to each other, are apt to confound and mislead us: as if the one judged without equity, and the other was not bound by any law. Whereas every definition or illustration to be met with, which now draws a line between the two jurisdictions, by setting law and equity in opposition to each other, will be found either totally erroneous, or erroneous to a certain degree.[2]

After this introduction he proceeds to deliver, as his account of the substantive rules of equity, an argument to show that the rules administered by the courts of law and equity are substantially the same. In this argument he adopts and puts into literary form Mansfield's views. Therefore

(2) *Blackstone gives us an account of equity and its relation to law which was highly speculative when he wrote it, and is positively misleading in the light of the subsequent development of equitable and legal doctrine.*

Blackstone's account of this matter can be summarized as follows: [3]

Equity does not exist, as some think, to abate the rigour of the law. There are many hard cases for which equity gives no relief; for example, the rule that the father cannot succeed as heir to his son. It is not true to say that equity interprets rules according to their spirit, and law according to their letter. Both law and equity interpret these rules according to their spirit. Courts of law can relieve against fraud and accident as well as courts of equity; and, though trusts are the peculiar property of equity, yet "there are other trusts, which are cognizable in a court of law; as deposits, and all manner of bailments; and especially that implied contract . . . of having undertaken

[1] Comm. iii 429. [2] Ibid 429-430. [3] Ibid 429-442.

to account for money received to another's use, which is the ground of an action on the case almost as universally remedial as a bill in equity." [1] Courts of equity are bound by precedents as much as courts of law, so that equity is as much a " laboured connected system " as the common law. Whatever was the case in the past, to-day law and equity are both artificial systems. The suggestion, made in every bill in equity, that the plaintiff has no remedy at common law, is a relic of the past.

He, who should from thence conclude, that no case is judged of in equity where there might have been relief at law, and at the same time casts his eyes on the extent and the variety of the cases in our equity-reports, must think the law a dead letter indeed. The rules of property, rules of evidence, and rules of interpretation in both courts are, or should be, exactly the same : both ought to adopt the best, or must cease to be courts of justice.[2]

Having thus demonstrated the essential similarity of the rules of law and equity, Blackstone is conscious of the fact that he may be thought to have proved too much. These rules were obviously dissimilar. They were administered in different courts, by means of a different procedure, and in a wholly different intellectual atmosphere. He attempts to deal with this difficulty in the following paragraph, which is historically very interesting, because it is a literary and explicit statement of the theory underlying the decisions of Mansfield and the judges who had adopted his views :

Such then being the parity of law and reason which governs both species of courts, wherein (it may be asked) does their essential difference consist ? It principally consists in the different modes of administering justice in each ; in the mode of proof, the mode of trial, and the mode of relief. Upon these, and upon two other accidental grounds of jurisdiction, which were formerly driven into those courts by narrow decisions of the courts of law,—viz. the true construction of securities for money lent, and the form and effect of a trust or second use ; upon these main pillars hath been gradually erected that structure of jurisprudence, which prevails in our courts of equity, and is inwardly bottomed upon the same substantial foundations as the legal system which hath hitherto been delineated in these commentaries ; however different they may appear in their outward form, from the different taste of their architects.[3]

[1] Comm. iii 432 ; this passage does not appear in the lectures ; on the contrary, Blackstone there said of trusts that they are the creatures of courts of equity, and cognizable nowhere else, see App. III p. 744.

[2] Comm. iii 434 ; this passage does not appear in the lectures, see App. III pp. 743-745.

[3] Comm. iii 436-437.

The Reasons Why the Views of Mansfield and Blackstone were Rejected

The passage from Blackstone which has just been cited shows the fallacy of the premises upon which the views of Mansfield were based. In the first place, both Mansfield and Blackstone ignored the fundamental difference between the point of view of the courts of law and the courts of equity, which is apparent from the very earliest period in the history of the equity administered by the court of Chancery. Equity, from the first, had always acted *in personam*.[1] It always took all the circumstances of the case and the conduct of the parties into consideration; and its remedies were, for that reason, always discretionary. The courts of law gave, as they were bound to give, the judgment to which the parties were entitled, taking into consideration only the facts pleaded and proved by the evidence. They could not travel out of the record.[2] In the second place, both Mansfield and Blackstone underrated the effect upon substantive rules of the working, for several centuries, of the differences "in the mode of proof, the mode of trial, and the mode of relief." These procedural differences had accentuated the fundamental difference between law and equity. They had thus given rise to many substantial differences, which tended to grow more fundamental as the variant effects of the two procedures were worked out in detail.

At the time of Mansfield and Blackstone the rules of the common law were, for the most part, fixed in their final form, and the rules of equity were fast ceasing to be fluid. In the sixteenth century, when the rules of the common law were still fluid, and the rules of equity were still more fluid, it was possible that changes in common law rules, which made a recourse to equity no longer necessary, would enlarge the jurisdiction of the common law courts and curtail the jurisdiction of the court of Chancery.[3] This was not possible in the middle of the eighteenth

[1] "*Doctor.* But in case where a subpœna lieth, to whom shall it be directed, whether to the judge or the party? *Student.* It shall never be directed to the judge, but to the party plaintiff or his attorney; and thereupon an injunction commanding them by the same, under a certain pain therein to be contained that he proceed no further at the common law, till it be determined in the king's *chancery*, whether the plaintiff had title in conscience to recover, or not," Doctor and Student, Bk. I, chap. xvii; see vol. iv 279-283; above 264.

[2] Of this Blackstone was aware, as shown by a passage in the lectures, which is not reproduced in the Commentaries, see App. III p. 744.

[3] Thus the development by the common law of the action of assumpsit made unnecessary much of the jurisdiction which, in the Middle Ages, equity had exercised over contracts, vol. i 456; vol. v 321-322; similarly, the admission of assumpsit on a *quantum meruit* rendered unnecessary a certain class of applications to the Chancellor, vol. iii 446-447; Ames, Lectures on Legal History 156; Hobart C.J. was reported to have said that the cestui que trust could recover damages in an

century. The fact that the common law courts were prepared to recognize trusts or equities of redemption, and the fact that they were prepared to give a large extension to the action for money had and received, could have no effect on the jurisdiction of the court of Chancery. Lord Eldon was very explicit on this matter. Dealing with the alteration in the law of pleading which enabled a lost deed to be pleaded without making profert of it, an alteration which obviated the need for applications to equity to restrain the adverse party from taking advantage of the absence of profert,[1] he said:

> I am quite sure, Lord Thurlow's opinion was, that courts of law, properly if you please, taking upon themselves to do that by new forms of pleading, which they had never before done, as dispensing with profert, or permitting the averment of a consideration not in the body of the deed, could not destroy the ancient jurisdiction of this court in matters of that nature. That unquestionably was his opinion. . . . It is not possible to maintain that the ancient jurisdiction is destroyed by the courts of law for the first time taking cognizance of that subject.[2]

The reasons which Eldon gave for this view go to the root of the matter, and show why the chancellors rejected the possibility of a fusion of law and equity in the manner supported by Mansfield and Blackstone. Dealing with this same question of the effect of the change in the common law rules as to profert,[3] he pointed out that the change was made by Mansfield "on the supposition that he did no more than was constantly done in courts of equity."[4] But:

> Speaking with all the deference due to Lord Mansfield, it does not appear to me that he exactly recollected what a court of equity would do in such a case; because there is a mighty difference between simply producing an instrument, and producing it in answer to a bill of discovery, where the defendant has an opportunity of accompanying the production with a statement of everything which is necessary to protect him from its consequences.[5]

action on the case against his trustees, Jevon v. Bush (1685) 1 Vern. at p. 344; but North C.J. said in Barnardiston v. Soame (1674) 6 S.T. at p. 1098, that "no action upon the case will lie for the breach of a trust, because the determination of the principal thing, the trust, does not belong to the common law, but to the court of Chancery"; Hobart was evidently trying to act on Fairfax's view, Y.B. 21 Edw. IV Pasch pl. 6 p. 23, endorsed by Blackstone, Comm. iii 52, that there would not have been so much need for the chancellor's equity if a proper extension had been given to actions on the case.

[1] See vol. vii 346-347.

[2] Bromley v. Holland (1802) 7 Ves. at pp. 20-21; cp. Toulmin v. Price (1800) 5 Ves. at pp. 238-239, where Lord Eldon said, "Lord Thurlow had a case (*Atkinson v. Leonard* 3 Bro. C.C. 218) before him, in which it was contended, that therefore, [i.e. because the courts of law had lately allowed a man to declare on a lost bond] it was [not] necessary to come into Equity in such a case: but Lord *Thurlow* said, it was new to him, that there was such a mode of declaring at law without *profert* . . .; but he held, that it would not take away the jurisdiction, that has so long prevailed in Equity."

[3] Prince of Wales v. Earl of Liverpool (1818) 1 Swans. 114.

[4] Ibid at p. 120.

[5] Ibid.

In fact, the hasty adoption of equitable rules by the courts of common law, without the safeguards with which equity hedged those rules about, actually caused applications to courts of equity for protection against the consequences of the rules thus adopted by these courts.

Many doctrines have been introduced into courts of law on a supposed analogy to the practice in equity, but without the guards with which equity surrounds the case; as in the instance of dispensing with *profert*, no man can enter this court without guarding his entrance by sanctions which the courts of law cannot impose; and it happens whimsically enough, that there are cases in which courts of law, proceeding on the principle of giving a remedy because one might be obtained in equity, have compelled the party to resort to equity for protection against that practice at law.[1]

On the same principle it was pointed out by Eldon that the admission, in 1789, in the case of *Pasley v. Freeman*,[2] of a common law action for deceit, could not oust the equitable jurisdiction in cases of fraud; and that it would be unjust if it did so, because the equitable relief was accompanied by safeguards which made it fairer to the defendant than the common law remedy:

A Defendant in this Court has the protection arising from his own conscience in a degree, in which the law does not affect to give him protection. If he positively, plainly, and precisely, denies the assertion, and one witness only proves it as positively, clearly, and precisely, as it is denied, and there is no circumstance, attaching credit to the assertion overbalancing the credit due to the denial, as a positive denial, a Court of Equity will not act upon the testimony of that witness. Not so at Law. There the Defendant is not heard. One witness proves the case; and, however strongly the Defendant may be inclined to deny it upon oath, there must be a recovery against him.[3]

The common law judges were conscious of the truth of these facts. They realized that they had not got the machinery for dealing with the personal equities which might arise from trusts and other matters falling under the jurisdiction of the court of Chancery. They therefore agreed with the Chancellor that the established boundaries between the courts of law and equity must be maintained.[4] The clearest statement of this point of view was made by Kenyon, C.J., in the case of *Bauerman v. Radenius*.[5] He said:

Our courts of law only consider legal rights: our courts of equity have other rules, by which they sometimes supersede those legal rules, and in

[1] Prince of Wales v. Earl of Liverpool (1818) 1 Swans. at p. 124.
[2] 3 T.R. 51. [3] Evans v. Bicknell (1801) 6 Ves. at p. 184.
[4] See e.g. Goodtitle d. Jones v. Jones (1796) 7 T.R. at p. 46; Marshall v. Rutton (1800) 8 T.R. at p. 547; Tucker v. Tucker (1833) 4 B. and Ad. at pp. 748-749 (argument by Erle to which the court assented).
[5] (1798) 7 T.R. 663.

so doing they act most beneficially for the subject. We all know, that if the courts of law were to take into their consideration all the jurisdiction belonging to courts of equity, many bad consequences would ensue. To mention only the single instances of legacies being left to women who may have married inadvertently: if a court of law could entertain an action for a legacy, the husband would recover it, and the wife might be left destitute: but if it be necessary, in such a case, to go into equity, that court will not suffer the husband alone to reap the fruits of the legacy given to the wife; for one of its rules is, that he who asks equity must do equity, and in such a case they will compel the husband to make a provision for the wife before they will suffer him to get the money. I exemplify the propriety of keeping the jurisdictions and rules of the different courts distinct by one out of a multitude of cases that might be adduced. If the parties in this case had gone into equity, and that court had directed an issue to be tried, they might have modified it in any way they thought proper. One of the rules of a court of equity is, that they cannot decree against the oath of the party himself on the evidence of one witness alone without other circumstances: but when the point is doubtful, they send it to be tried at law, directing that the answer of the party shall be read on the trial; so they may order that a party shall not set up a legal term on the trial, or that the plaintiff himself should be examined; and when the issue comes from a court of equity, with any of these directions, the courts of law comply with the terms on which it is so directed to be tried. By these means the ends of justice are attained, without making any of the stubborn rules of law stoop to what is supposed to be the substantial justice of each particular case; and it is wiser so to act, than to leave it to the judges of the law to relax from those certain and established rules by which they are sworn to decide.[1]

This reasoning was accepted by the judges in the nineteenth century, when they were faced by the problem of interpreting section 83 of the Common Law Procedure Act of 1854,[2] which had given the courts of common law power to give effect to certain equitable defences. In 1855, in the case of *Wodehouse v. Farebrother*,[3] Lord Campbell, C.J., explained that these sections only applied when the equitable defence was such that a plaintiff in equity setting it up could have got an absolute and perpetual injunction against the action at law. If the defence was such that the plaintiff could only have got a temporary or a conditional injunction it could not be pleaded, because no common law judgment would meet the case. When it was necessary to plead such a defence the only way of doing justice to the parties was by means of a suit in equity, and by a decree of a kind which only the courts of equity had power to pronounce. "We cannot enter into equities and cross equities; we should often be without means to determine what are the fit conditions on which relief should be given."[4] Two years later, in the case of *Gee v. Smart*,[5] Coleridge, J., laid down the same principle. He said:

[1] At pp. 667-668.
[2] 17 and 18 Victoria c. 125.
[3] 5 E. and B. 277.
[4] Ibid at p. 290.
[5] (1857) 8 E. and B. 313.

The question is, however, whether this is such a plea as, under the 83rd section of The Common Law Procedure Act, 1854, we are authorized to receive. And several cases have decided that, to make it such, the facts it discloses must entitle the defendant to an absolute and perpetual injunction against the judgment which the plaintiff might otherwise have obtained at law. If our common law judgment on the plea for the defendant will not do final justice between the parties, but the plea is in the nature of a bill in equity, calling upon the Court for that sort of conditional and manifold award which is in the nature of a decree in equity, and not a judgment made at law, we cannot entertain it, because we have no authority to pronounce, or machinery to enforce, such an award.[1]

If these principles still held good in 1855, they were still more true of the unreformed common law of the middle of the eighteenth century; and they afford an abundant justification for the rejection of Mansfield's views by the judges and Chancellors of the latter part of that century.

And I think that it may be maintained that, in the then existing condition of the procedure of the courts of law and equity, the separation of law and equity was necessary for both. On the one hand, the common law system of procedure, pleading, and evidence fitted it to deal only with single issues defined by the pleading of the parties, and made it quite unable to deal with those questions of the personal conduct of the parties upon which the decisions of the Chancellors were based. On the other hand, all equitable interference with the law must, as was long ago pointed out in the *Doctor and Student*, be based upon a correct appreciation of the law applicable to the particular case.[2] If conflicts between the courts of law and equity as to what the law was, were to be avoided, if the equitable modifications of the law were to be saved from starting from false premises, it was advisable that the courts of law should be able to lay down the law applicable to the particular case or cases stated by the court of Chancery in the manner described by Kenyon.[3] This separation of law and equity was needed if equity, by means of its more flexible procedure, was to be able to modify and supplement the legal rights of the parties in accordance with its ideas of justice, and, at the same time, to avoid the danger of evolving a set of equitable rules and principles which directly contradicted the rules of the common law. Paradoxical as it may appear, the preservation of the boundaries of the jurisdiction of the separate courts of law and equity was, in the then existing circumstances, necessary to preserve the free and the harmonious development both of law and of equity.

[1] (1857) 8 E. and B. at p. 319; see also Spence, Equitable Jurisdiction i 704-708, who comes to the same conclusion.

[2] "Conscience must always be grounded on the law," Bk. I, chap. xxvi; "to search conscience upon any case of the law it is in vain, but where the law in the same case is perfectly known," Bk. II, Introduction; vol. iv 279-283.

[3] Above 597-598.

That was the opinion of Hardwicke. In his letter to Lord Kames he gave good reasons for agreeing with Bacon's view, that it was better that the jurisdictions of the courts of law and equity should be separate. He said : [1]

I agree that, in considering this point upon different principles, there is room for different determinations. All the arguments drawn from the ease and convenience of the suitors, the preventing vexation and delay, and saving of expense, seem to conclude for uniting them in the same court. On the other hand, the arguments drawn from the necessity, or utility, of preserving the rules of law entire, and not leaving it in the power of judges to new-mould and vary those rules at discretion, by insensibly blending law and equity together, hold for keeping them divided. These reasons regard the constitution of the government, and have always appeared to me to outweigh the others ; inasmuch as what is of general and public consequence, ought to be preferred to private or particular convenience. My Lord Bacon says, *Si fiat commixtio jurisdictionum, arbitrium tandem legem trahet,*[2] and I think I have in some instances seen that effect produced. No wonder then, that a people jealous of their liberties, and fond of their laws, and therefore desirous to bind the hands of their judges by stated rules, should lean against so dangerous an institution. Besides the tendency it would have to make the judges of the common law law-makers in matters of property, I think, in time, it would have an effect of the like kind upon cases of crime, which affect life and liberty. In most countries the genius of the civil and criminal law is the same ; and the rules, both of the one and of the other, are analogous. Arguments are often drawn from the rules in civil cases to influence the decision of criminal ones, when doubtful questions arise. Suppose then for a moment, that in such a mixed jurisdiction, the judges have let in certain principles of equity to become rules of law, though not originally founded in the common or statute law ; suppose also, that in tract of time, the commencement of this change is forgot and lost ; the points thus established will pass for original common law, and be argued from to govern decisions in criminal matters ; in which the most obvious points that occur to the mind may be questions of evidence. If this had been allowed in England, I fear the common law would have sunk long ago, and everything been restored into the *arbitrum boni viri.*

This reasoning was assented to by Kenyon ; [3] and it commended itself to the writers of *The Federalist*, who had had experience of judicial systems in which law and equity were administered by the same tribunals.[4] They said : [5]

The great and primary use of a court of equity, is to give relief *in extraordinary cases*, which are *exceptions* [6] to general rules. To unite the

[1] A. F. Tytler, Memoirs of Lord Kames i 329-345 ; P. C. Yorke, Life of Hardwicke ii 553.

[2] De Augmentis, Bk. VIII Chap. iii Aph. 45, cited vol. v 486 n. 3 ; and with this view James I agreed, Works 559, cited vol. iv 279 n. 4.

[3] Bauerman v. Radenius (1798) 7 T.R. at p. 667.

[4] See The Federalist no. lxxxiii. [5] Ibid.

[6] The authors add in a note that " it is true that the principles by which that relief is governed are now reduced to a regular system ; but it is not the less true that they are in the main applicable to *special* circumstances, which form exceptions to general rules " ; see above 262.

jurisdiction of such cases, with the ordinary jurisdiction, must have a tendency to unsettle the general rules, and to subject every case that arises to a *special* determination : while a separation between the jurisdictions has the contrary effect of rendering one a sentinel over the other, and of keeping each within the expedient limits. Besides this, the circumstances that constitute cases proper for courts of equity, are in many instances so nice and intricate, that they are incompatible with the genius of trials by jury. They require often such long and critical investigation, as would be impracticable to men called occasionally from their occupations, and obliged to decide before they were permitted to return to them. The simplicity and expedition which form the distinguishing character of this mode of trial require that the matter to be decided should be reduced to some single and obvious point ; [1] while the litigations usual in Chancery, frequently comprehend a long train of minute and independent particulars.[2]

And then it is pointed out that, though the separation between law and equity was peculiar to English law, trial by jury was also peculiar to it ; so that arguments against that separation, taken from legal systems which did not use that method of trial, were inapplicable. In fact the adoption of the contrary view, in the form advocated by Mansfield and Blackstone, and under the existing procedural conditions, would have thrown into confusion both the common law and equity. It would have made the administration of equity very difficult because it would have made the rules both of law and equity uncertain ; and it would therefore have retarded the growth of settled principles of equity. A " partial amendment " of this kind would, as Bentham said, have been " bought at the expense of universal certainty," and would have spelt confusion.[3]

The Results of the Rejection of this View upon the future Relations between and the future Development of Law and Equity

The judges who rejected the views of Mansfield and Blackstone would not have disagreed with Blackstone's statement that,

there cannot be a greater solecism, than that in two sovereign independent courts established in the same country, exercising concurrent jurisdiction, and over the same subject-matter, there should exist in a single instance two different rules of property, clashing with or contradicting each other.[4]

But they differed entirely from Mansfield and Blackstone as to the best means of avoiding this solecism. Their solution of the problem of the relation of law to equity was not a fusion,

[1] See vol. iii 627-628 ; vol. ix 264, 316. [2] See ibid 338, 378.
[3] Bentham, A Comment on the Commentaries, 214, cited above 558-559.
[4] Comm. iii 441.

but a partnership, based upon a division of the jurisdiction of the court of Chancery under the well-known three heads of auxiliary, concurrent, and exclusive. That classification, implicit in the equitable jurisdiction all through the eighteenth century, was made explicitly by Fonblanque in his *Treatise of Equity*, the first edition of which was published in 1793-1794.[1] The principles of equity coming under these three heads were so developed that a conflict between the rules of law and equity was avoided. There was no doubt a conflict between the rights and duties of citizens as defined by the rules of law and equity: there was no conflict between the rules themselves. As Maitland puts it: "Equity had come not to destroy the law, but to fulfil it. Every jot and every tittle of the law was to be obeyed, but when all this had been done something might yet be needful, something that equity would require."[2] Something, that is, which equity would require of all citizens, either in order to help the administration of the law, or in order to enforce duties or protect rights which were outside the ken of the common law. The rules of equity operated not on the law, but *in personam* on the litigants who came before the court of Chancery.

This distinction has always appeared to be something of a quibble to laymen. Palgrave emphasized its anomalous character;[3] a similar view was taken by Bethell, the future Lord Westbury, when he was surveying the English legal system from the point of view, not of an English lawyer, but of a student of jurisprudence.[4] Nevertheless the correctness of Maitland's assertion that there was little conflict between the actual rules of law and equity is proved by the small effect of the provision of the Judicature Act[5] that, in case of conflict between the rules of law and equity, the rules of equity should prevail.[6] So skilfully had the relationship between law and equity been regulated by the Chancellors and judges who had rejected Mansfield's policy of fusion for the historic policy of partnership.

When, in the nineteenth century, reform came, it did not take the form outlined by Mansfield and Blackstone. Redress of practical abuses, not change for the sake of symmetry or

[1] Fonblanque, Treatise of Equity (5th ed.) i 9.
[2] Maitland, Equity (1st ed.) 17.
[3] Palgrave, Original Authority of the King's Council 1, cited vol. i 635.
[4] "For above a century this country has exhibited the anomalous spectacle of distinct tribunals acting upon antagonistic principles, and dispensing different qualities of justice. It is the rule and duty of one set of Courts frequently to refuse to recognize the real right of ownership, to ignore defences and claims founded on the best established rules of justice; and the prevention of gross injury committed in the name of law is made to depend upon the other Court being quick enough to overtake and arrest the first in its career of acknowledged injustice, and prevent it from deliberately committing wrong," Papers of the Juridical Society i 4.
[5] 36, 37 Victoria c. 66, § 25. [6] Maitland, Equity (1st ed.) 151-155.

juristic theory, has generally been the aim of the English reformer; and, though the endowment of research in the social sciences tends to stimulate the demand for changes which are advocated merely in order to realize academic ideals, the older and saner policy still holds it own. At any rate that was the policy of the law reformers of the second and third quarters of the nineteenth century. These reformers thought, and rightly thought, that what most required reform was, not the substantive rules of law and equity, but the procedure of the common law courts and the court of Chancery.[1] For instance, the real property commissioners reported in 1829 that "the law of real property required very few essential alterations," and that, "except in a few comparatively unimportant particulars, it appears to come almost as near to perfection as can be expected in any human institution"; [2] and that was the view taken as to the state of very many of the rules of law and equity. On the other hand, we have seen that the system of procedure and pleading in the courts of common law was a mass of anomalies and technicalities which often had the effect of defeating justice; [3] and that the system of procedure and pleading in the court of Chancery was perhaps the worst abuse in an age in which there were many abuses.[4] Consequently the energy of the reformers was largely concentrated on these systems. These reforms culminated in the Judicature Acts. They fused the courts of law and equity; they created an almost uniform system of procedure and pleading; and they provided that, in cases of conflict between the rules of law and equity, the rules of equity should prevail; but they did not fuse the two systems of rules.

It is sometimes said that Mansfield attempted to anticipate the Judicature Acts. That is to some extent true. It is true in so far as those Acts fused the jurisdiction of the courts which administered law and equity; and it is true in so far as they got rid of conflicts between law and equity by providing that, in case of conflict, the rules of equity should prevail. But it is not wholly true. If the views expressed by Mansfield and approved by Blackstone had become established, there would have been a fusion of many of the substantive rules of law and equity, and not merely a fusion of jurisdiction, procedure, and pleading. The adoption of their views as to the relations of law and equity would have had an effect similar to the adoption of their views as to the doctrine of consideration. It would have

[1] A good illustration of this tendency is to be found in the Act of 1833 which abolished fines and recoveries, 3, 4 William IV, c. 74; the expensive and cumbersome procedure was abolished, but the law which that procedure had created was, in all its main essentials, preserved.

[2] First Report of the Real Property Commission 6-7.

[3] Vol. ix 245-262, 314-327.

[4] Ibid 339-375, 393-406.

meant a wholly new departure in legal doctrine, and would therefore have changed the course of English legal history. The adoption of their views as to the doctrine of consideration would, as Sir Frederick Pollock has pointed out, have altered "the whole modern development of the English law of contract." [1] The adoption of their views as to the relations of law and equity would have meant that the Judicature Acts, when they came, would have completed a fusion between the substantive rules of law and equity which had long been in progress. They would not have been merely a first step in the direction of fusion.

What will be the nature of the agencies by which the further steps in the direction of complete fusion will be taken? No doubt the chief agency will be in England, as it was at Rome, the Legislature. Acts like the Property Acts of 1925 have gone far to substitute uniform statutory rules for the distinct and supplementary rules of law and equity. Another agency is the action of a uniform Supreme Court. But the action of these agencies will take time. The statutory rules of the Property Acts are derived both from the rules of equity and the rules of law. Though they are now statutory and therefore legal rules, it must not be forgotten that they have increased the number of purely equitable interests; that very many of their provisions are simply restatements, with or without modification, of equitable principles; and that they contemplate that the powers and discretions which they give to the Court will be exercised in accordance with those principles. The High Court, for convenience of business, is split into Divisions; and the traditions of the separate courts of law and equity are to a large extent inherited by these separate Divisions. Blackstone noted the fact that the "distinction between law and equity, as administered in different courts, is not at present known, nor seems to have ever been known, in any other country at any time." [2] But he had no idea of the fundamental importance of this fact. He had no idea that it made a fusion between law and equity impossible in his day, and that it would continue to operate long after the separation between the courts of law and equity had been abolished. The fact that the two courts had evolved distinct procedures, distinct modes of pleading, and distinct rules of evidence, was fatal to the scheme of fusion which he advocated; and though these differences have now, for the most part, disappeared, the different genesis of the rules evolved in these jurisdictions, the different technical approach to these rules, and the different points of view of the lawyers who, in the several Divisions of the High Court, administer them, will long militate

[1] Pollock, Contracts (9th ed.) 191, cited vol. viii 34.
[2] Comm. iii 49.

against complete fusion.[1] What Maitland said of the forms of action is true of the differences between law and equity. The separate courts of law and equity and their separate systems of procedure and pleading and evidence are dead. But they "rule us from their graves," because they still live in the two separate systems which they have created, and, consequently, in the separate intellectual cast which they impose upon those who study and apply them.[2]

VI

The Sphere of the Civilian's Practice

"Our English civilians and canonists," said Gibbon, "have never been famous; their real business is confined to a small circle: and the double jurisprudence of Rome is overwhelmed by the enormous profession of the common lawyers, who, in the pursuit of honours and riches, disdain the mock Majesty of our *budge* doctors."[3] This comparatively unimportant position which the civilians occupied was the result of the constitutional conflicts of the seventeenth century.[4] Gibbon's statement is as substantially true of the latter part of the seventeenth century as of the eighteenth century; and the account which Dickens gives us of Doctors' Commons and the civilians in *David Copperfield* shows that it is equally true of the nineteenth century.[5] But though the civilians were a small and select body, we have seen that they were a well-organized branch of the profession;[6] that, if their business was inconsiderable as compared with the business of the practitioners in the courts of common law and equity, it was variegated, and some of it was very important; and that Doctors' Commons during its long history conferred great services on the state, and left its mark upon important departments of English law.[7]

The sphere of the civilians' practice can be grouped under the following heads: In the first place, it comprised the numerous topics which fell within the rubric Ecclesiastical Law; and, though the number of these topics had been diminished by the Legislature,[8] and encroached upon by the courts of common law and equity,[9] much was still left, including a large matrimonial

[1] The judgments in *In re* Wait [1927] 1 Ch. 606 are a good illustration of this fact; see Sir Frederick Pollock's Note on that case L.Q.R. xliii 293-295.
[2] See ibid li 159-161.
[3] Autobiographies of Gibbon, Memoir F, p. 69, cited vol. iv 272 n. 1.
[4] Vol. i 556-557, 577-578; vol. v 24-25, 153-154.
[5] Above 49-50; for Doctors' Commons see vol. iv 235-237; above 46-49.
[6] Above 47.
[7] Above 50.
[8] Vol. i 618, 620.
[9] Ibid 621, 629.

jurisdiction,[1] and an exclusive jurisdiction over the grant of probate and letters of administration.[2] In the second place, though the civilians had been deprived of the greater part of their former jurisdiction over commercial and maritime cases, there was still left to them a number of cases which fell within the jurisdiction of the court of Admiralty;[3] and over prize cases they had an exclusive jurisdiction.[4] In the third place, the fact that they had an exclusive jurisdiction in prize cases made it necessary for them to study international law more closely than the practitioners in the common law courts and the courts of equity. Therefore in this, as in the preceding period,[5] they were consulted by the government on these questions, and gave valuable assistance to the attorney and solicitor-general.[6] In the fourth place, the jurisdiction of the Constable and Marshal's court over the discipline of the army, which, in the fifteenth and sixteenth centuries, had been the preserve of the civilians, had changed its character;[7] and the subordinate branches of its jurisdiction, over heraldry and slanders upon men of noble blood, had disappeared.[8] Lastly, because the advocates were obliged to take the degrees of doctor of civil law as a part of their qualification to practice,[9] they had some acquaintance with Roman Law; and in this, as in the preceding period, they kept alive the study of Roman Law, and the study of legal theory and comparative law.[10]

I shall say something, first of the literature on these different topics; and secondly, of some of the most eminent of the civilians of this period. Lastly, I shall give some account of the place of the learning and practice of the civilians in the English legal system.

The Civilian Literature [11]

The largest part of this literature is concerned with the various topics covered by the ecclesiastical law, and I shall give some account of it in the first place. In the second place, I shall give some account of the literature which centres round the Admiralty and Prize jurisdiction; thirdly, I shall say

[1] Below 685-686. [2] Vol. v 320; vol. vi 652; below 686-689, 695-697.
[3] Below 692-693. [4] Vol. i 564-566; above 536; below 693-694.
[5] Vol. iv 238; vol. v 5-7. [6] Above 469; below 637-638.
[7] Vol. i 576-578; vol. iv 238; vol. v 15-16; vol. x 710-712; below 629-630.
[8] Vol. i 578-584; the last case of heraldry reported is Sir Henry Blount's Case (1737) 1 Atk. 295, where the question before the Lord Chancellor was whether he would grant a commission of delegates to hear an appeal from an interlocutory order of the court; he held that as a general rule he could not do so.
[9] Above 47, 83-85. [10] Vol. v 16-24; below 639-646.
[11] I have found that Leslie F. Maxwell's Bibliography of English Law, vols. i and ii, is the most useful guide to this, as to other, departments of legal literature.

something of the books upon martial law; fourthly, of the literature upon topics of international law; and lastly, of the literature upon Roman law and jurisprudence. For the largest part of this literature the civilians are responsible; but for some of it, and more especially upon topics which belonged partly to the civilians' and partly to the common lawyers' practice, common lawyers are responsible; and a few books were written by ecclesiastics and statesmen.

Ecclesiastical Law.

The three important books upon ecclesiastical law as a whole are Gibson's *Codex Juris Ecclesiastici Anglicani*, Ayliffe's *Parergon*, and Burn's *Ecclesiastical Law*. I shall first give an account of these three books, and then of the books which deal with special topics in ecclesiastical law, and ecclesiastical antiquities.

Edmund Gibson (1669-1748),[1] Bishop of London, wrote much on many topics. Among his books are an edition of the Anglo-Saxon Chronicle, an English translation of Camden's Britannia, and an edition of Henry Spelman's works. His literary abilities brought him to the notice of Tenison, the archbishop of Canterbury, who made him his domestic chaplain and librarian. At the beginning of the eighteenth century he was involved in the controversy as to the position of the upper and lower Houses of Convocation, and took a leading part in opposing Atterbury's view that the archbishop had no power to prorogue the lower House. This controversy seems to have turned his attention to the topic of ecclesiastical law. In 1702 he published his *Synodus Anglicana*, which describes the constitution and procedure of convocation, and has always been regarded as the most authoritative work on this subject. In 1713 he published his greatest work—the *Codex Juris Ecclesiastici Anglicani*.[2] In 1716 he was made bishop of Lincoln, and in 1720 he was translated to London. While he was bishop he published many pastoral and theological books, and *A Collection of the Principal Treatises against Popery;* and when Archbishop Wake was incapacitated by illness, he was Walpole's chief adviser on ecclesiastical matters. But in 1736 he offended Walpole by his opposition to the Quakers' Relief Bill. It was probably for this reason that, when Wake died in 1737, Gibson was passed over, and Potter was made archbishop of Canterbury. When Potter died in 1747 the archbishopric was offered

[1] D.N.B.

[2] Codex Juris Ecclesiastici Anglicani: or the Statutes, Constitutions, Canons, Rubricks and Articles of the Church of England, Methodically Digested under their proper Heads. With a Commentary, Historical and Juridical.

to Gibson, but he declined it on account of his age and infirmities. He died in 1748.

Gibson's Codex is a collection of all the statutes, constitutions, canons, rubrics, and articles relating to ecclesiastical affairs from the earliest times. These sources of the law are grouped "in conformity to the method of the Decretals" of Gregory IX, and of the method followed by Lyndwood,[1] under fifty-two titles; each title is divided into chapters; and each chapter is composed of the text of the relevant statutes, constitutions, canons, rubrics, and articles, accompanied by an abridgment and a commentary.[2] The commentary is based upon the common law writs, reports, Lyndwood's and Athon's Commentaries, the practice of the Church derived from ecclesiastical records, the canon law, the decrees of Councils and Synods, and the rules of the common law and canon law.[3] An Appendix contains an account of the statutes relating to tithes in London, a collection of instruments relating to various topics of ecclesiastical law, and chronological tables of statutes, articles, and constitutions. The best proof of the comprehensiveness of the book is the list of the titles which will be found at the foot of the page.[4] It was the only book which collected

[1] Preface vii; for these Decretals see vol. ii 140-141; for Lyndwood see vol. i 582.

[2] Preface ix. [3] Ibid xi-xv; for Athon see vol. i 582 and n. 6.

[4] I Rights, Privileges, and Immunities of the Church and Clergy (6 chaps.); II Supreme head of the Church of England Papal and Regal (3 chaps.); III Papal encroachments in England abolished, and the powers restored to the King or vested in the Archbishop of Canterbury (5 chaps.); IV Orders of Ministers in the Church of England and the forms of Consecration and Ordination (2 chaps.); V The manner of electing and consecrating Bishops and Archbishops (8 chaps.); VI The ordination of Priests and Deacons (11 chaps.); VII The conversion and apparel of Ministers (3 chaps.); VIII Cathedral and Collegiate Churches of the old and new foundation (6 chaps.); IX Parochial Churches and Chapels with their proper Officers (20 chaps.); X Solemn times of Divine Service in the Church of England (6 chaps.); XI Uniformity in the Public Worship and Ceremonies of the Church of England (5 chaps.); XII Attendance upon the Public worship and orderly behaviour in the Church (2 chaps.); XIII Manner and Order of Daily Service in the Church (5 chaps.); XIV Preaching, Lectures, and Homilies (9 chaps.); XV Orthodox Preaching according to the Scriptures, Creeds, and Articles (4 chaps); XVI Preaching of heretical doctrines; and of Heresy and Hereticks (4 chaps.); XVII The Sacraments of the Church in general (3 chaps.); XVIII The Sacrament of Baptism (12 chaps.); XIX Publick Catechizing and confirmation (6 chaps.); XX The Sacrament of the Lord's Supper (15 chaps.); XXI The two Popish Sacraments of Penance and Extreme Unction (3 chaps.); XXII Matrimony: how it is duly solemnized and dissolved (17 chaps.); XXIII Visitation of the Sick and Burial of the Dead (5 chaps.); XXIV Probate of Wills and Administration of Intestate Estates (10 chaps.); XXV Protestant Dissenters and Conventicles (6 chaps.); XXVI Popish Priests and Recusants (10 chaps.); XXVII Perpetual Security to the Church of England against Papists and Popery (5 Chaps.); XXVIII Land given in Mortmain (2 chaps.); XXIX Possessions and Revenues of Bishopricks (3 chaps.); XXX Possessions and Revenues of the Clergy (15 chaps.); XXXI Leases of Bishopricks, Dignities, and Benefices (8 chaps.); XXXII Profits of Vacations and remedies for Dilapidations (4 chaps.); XXXIII Advowsons and Rights of Presentation to Ecclesiastical Benefices (13

together the whole of the law enacted by Parliament or by Convocation concerning ecclesiastical matters; and the short and learned notes, which were appended to these enactments, when explanation was necessary, were of great use both to the clergy and to the lawyers. It is not surprising that it was reprinted in 1761, and that an epitome by Richard Grey, which was published in 1730, reached a fourth edition in 1743.

Gibson explains in his Preface that the book was intended primarily for the clergy, and not for the professors of the common or civil law; and he is at pains to disclaim any desire to encroach upon their province.[1] At the same time, he claims that the book would be of use to the lawyers, because it sets before them the laws as they are and as they have been, and so facilitates the task of interpretation.[2] It was, as he said,[3] not only a statement of the existing law, but

> a history of the law, in which the reader has the satisfaction to see, by what degrees it has been growing and improving, in all points, from its infancy to its present stature: and that retrospect not only supplies the lawyer with many necessary notices for the true construction of the law, but enables the historian also to account for every law, and the ground and reason of it, within any period of time that he is concerned in.

Gibson's claim that the book would for these reasons be useful to the lawyers is justified, and his Codex has always been regarded as a book of very high authority.

But Gibson was first and foremost an ecclesiastic, who had high ideas of the place which the clergy and the church ought to occupy in the state. We have seen that the historical argument put forward by Henry VIII in the preamble to the statute of Appeals, to prove the continuity and catholicity of his new Anglican establishment, was accepted both by the lawyers and by the theologians.[4] But the members of these two professions did not always draw the same inferences from it. This historical argument could be made the basis of a claim for a divine

chaps.); XXXIV Legal Possession of Dignity and Benefice (11 chaps.); XXXV First Fruits and Tenths (9 chaps.); XXXVI Residence, Non-residence, and Curates (6 chaps.); XXXVII Plurality and Commendam (2 chaps.); XXXVIII Union and Division of Churches (2 chaps.); XXXIX Ecclesiastical Power and Jurisdiction in General (2 chaps.); XL Synods and Convocations of Bishops and Clergy (5 chaps.); XLI Constitutions and Canons of the Church of England (5 chaps.); XLII Visitation; and of Presentments and Procurations (10 chaps.); XLIII Offices and Officers belonging to the Spiritual Court (8 chaps.); XLIV Spiritual Courts and Proceedings therein (6 chaps.); XLV Prohibition, Appeals, and Inhibitions (7 chaps.); XLVI Censures and Punishments in the Spiritual Courts (11 chaps.); XLVII Spiritual Crimes and Vices restrained by temporal Punishments (7 chaps.); XLVIII Temporal Persons and Matters of Spiritual Cognizance (6 chaps.); XLIX Benefit of Clergy and Purgation of Clerks Convict (7 chaps.); L Privilege of Sanctuary and the ordering of Sanctuary Persons (3 chaps.); LI The State and Condition of Religious Houses and Persons (10 chaps.) LII Dissolution of Religious Houses.

[1] Preface i-iii. [2] Ibid iii-iv. [3] Ibid v-vi. [4] Vol. i 591.

origin for ecclesiastical authority and jurisdiction, which would give to the church, and the ecclesiastical courts and ecclesiastical law, an independent position in relation to the state and the temporal courts and the common law. These claims were made by Bancroft [1] and Laud [2] in the sixteenth and seventeenth centuries; and they were made again by the leaders of the Oxford movement in the nineteenth and twentieth centuries. But the Great Rebellion had given the common law the victory over all rival courts, secular as well as ecclesiastical, had emphasized the legal character of the royal supremacy, and had therefore confirmed the claim of the common lawyers to interpret its meaning.[3] Moreover, the power of Convocation to make canons, even canons binding the clergy only, was very limited; and after 1717, and during the whole of the remaining years of this century, it was never allowed to do any business.[4] When therefore Gibson, in *An Introductory Discourse concerning the Present State of the Power Discipline and Laws of the Church of England*, and in some passages in the book itself, revived these high ecclesiastical claims, he naturally drew down upon himself the wrath of the common lawyers. His view that the church and the bishops had, by divine right, an independent position, and an independent sphere of activity, upon which the temporal courts, the temporal law, and even the temporal Legislature, had no right to encroach, was answered by Michael Foster, the future judge,[5] in a very able pamphlet,[6] in which he showed that these claims were unconstitutional, not justified by history, wholly contrary to Reformation principles, and not remotely related to similar claims made by the church of Rome.

These claims made by Gibson could not be justified, and they were wholly out of harmony with the policy on ecclesiastical matters pursued by the state during this century.[7] But their advocacy occupies a very small part of the book; so it does not seriously affect the value, both to lawyers and theologians, of the great collection of documents, and of the learned commentary which the author has appended to them.

Gibson's book was designed primarily for the clergy and only secondarily for ecclesiastical lawyers. The second of these books—Ayliffe's *Parergon*—was written by an ecclesiastical lawyer for ecclesiastical lawyers.

John Ayliffe (1676-1732) [8] was educated at Winchester and New College, Oxford. Until 1710 he practised as a proctor

[1] Vol. v 429-430. [2] Vol. vi 132-133. [3] Vol. i 594-596, 597.
[4] Vol. x 422. [5] Above 135-137.
[6] An Examination of the Scheme of Church Power, laid down in the Codex Juris Ecclesiastici Anglicani; it was first published in 1735, it reached a third edition in 1736, and a fifth edition in 1763.
[7] Vol. x 421-423. [8] D.N.B.

in the court of the Chancellor of the University. But since he was an ardent Whig who did not conceal his opinions, he made enemies at Oxford. In his book on Oxford, which he had published just before Queen Anne's death, he alleged that the funds of the Clarendon Press had been misappropriated. For this offence he was summoned before the Chancellor's court at the suit of the then Vice-Chancellor and his predecessor, and the court deprived him of his degrees and expelled him from the university. At the same time he had quarrelled with the warden of New College, whom, it was alleged, he had threatened to "pistol," and he was obliged to resign his fellowship. But though Ayliffe was a hot-tempered man and destitute of tact, he was very learned. His book on Oxford, which got him into trouble, purports to be an abridgment and correction of Wood's history. It shows much learning, but it is too exclusively legal to be popular. His fame rests upon his two books on the civil and canon law. Of the first of these books, which was published after his death, I shall speak later.[1] The second, which is entitled *Parergon Juris Canonici Anglicani*,[2] was published in 1726, and there was a second edition in 1734.

The book, Ayliffe tells us, was composed for his own use when he was a practitioner in the ecclesiastical courts, "and had a prospect of succeeding to some chancellorship, or other preferment in the church of the like nature."[3] He published it, he says, "not only with a design of doing some service to my country, by illustrating the force and practice of the Canon Law, as far as it has been received, and is now observ'd among Englishmen, but also with a purpose of exposing the errors and superstition of the Romish Church."[4] The historical introduction to the book is a learned history of the canon law, of its position in England before the Reformation, and of the position which it had taken as the result of Henry VIII's legislation. Ayliffe points out that a knowledge of both the canon and civil law was essential to practitioners and judges in the ecclesiastical courts, partly because their rules of procedure depended upon them; partly because "we shall be without the decisions of several important and considerable controversies, which, being taken from the laws of nature and nations are not to be met with in any other books but in those of the civil and canon law"; and partly because "both these laws are at this day so link'd together, that no one can be said to be a lawyer

[1] Below 641-642.

[2] Parergon Juris Canonici Anglicani: or a Commentary, by way of Supplement to the Canons and Constitutions of the Church of England. Not only from the books of the Canon and Civil Law, but likewise from the Statute and Common Law of this Realm.

[3] Introduction iii.

[4] Ibid.

beyond sea, without understanding both of them." [1] But he admits that some chancellors showed small knowledge of these laws; [2] and that "the reigning power of the common law" had diminished the jurisdiction of the ecclesiastical courts.[3] The law is treated of under alphabetical headings, beginning with *Abbots* and ending with *Witnesses*. The information under each head is clearly expressed and well arranged, and full references are given to the authorities in the civil and canon law, and to the English statutes and decisions. Though it was to a large extent superseded by Burn's more popular book on ecclesiastical law, it has always been regarded as a book of great authority.[4]

Burn [5] was a clergyman; but, unlike Gibson, he had no high ecclesiastical views. In fact he was much more of a lawyer than a theologian; and he had a talent for the exposition of legal principles, which was due partly to his mastery of them, and partly to his practical experience as chancellor of the diocese of Carlisle, and as a justice of the peace. These gifts enabled him to write, not only the standard book upon the justices of the peace,[6] but also a book upon Ecclesiastical Law [7] which was as learned as his book upon the justices of the peace, and almost as popular. It was first published in 1763 in two quarto volumes; and in 1842 it reached a ninth edition,[8] and had expanded to four stout octavo volumes. In the preface the author gives a sketch of the history of the civil and canon law, and short accounts of the position of the ecclesiastical law in England after the Reformation, of the common and statute law, and of that part of the jurisdiction of the court of Chancery which was exercised by it concurrently with the ecclesiastical courts. The subject matter of the book is arranged under alphabetical titles beginning with *Abbot* and ending with *Wills*. The longer titles are very clearly arranged. They contain the history of the law, a full account of the relevant statutes, the decisions of the courts, and the learning derived from the books and other authorities for the civil and canon law. Burn, like Gibson be-

[1] Introduction xxxvi.

[2] "At present thro' the idleness and corruption of the times, and thro' the small regard that some of our bishops have shewn to their own courts, we have had but few Chancellors that understand either the civil or canon-law, tho' the canon of our Church requires a good proficiency in the knowledge of both these laws in ecclesiastical courts," ibid xli.

[3] "This I find true by experience, that where there are two different jurisdictions in one and the same kingdom, unless they be carefully bounded by the Prince, and an equal regard had to both, so far as the necessary use of them in the state requires, as the advancement of the one increases, so does the practice of the other decrease, especially if one has got the countenance of the state more than the other," ibid xlii.

[4] Veley v. Burder (1841) 12 Ad. and El. at p. 302 *per* Tindal C.J.

[5] Above 332. [6] Ibid 332-334.

[7] Ecclesiastical Law. By Richard Burn LL.D., Vicar of Orton in the County of Cumberland.

[8] Edited by Robert Phillimore.

fore him,[1] laments the absence of reports of cases in the ecclesiastical courts, and points out that this is the reason why "the law and practice of those courts is not so generally understood." [2]

It can I think be said that the book accomplishes the object which the author tells us in the first sentence of his preface that he had set before himself. The four component parts of the ecclesiastical law of England are, he says, the civil, the canon, the common, and the statute laws. "From these digested in their proper rank and subordination, to draw out the uniform law of the church, is the purport of this book." [3] It was no easy task to explain clearly a body of law which was compounded of such different, and, at times, hostile, sources.[4] Burn's learning in all these sources of the law, and his gift of clear exposition, enabled him to write the clearest and most successful of all the great treatises upon English ecclesiastical law.

The only other book upon ecclesiastical law as a whole, which need be mentioned, is a book in two volumes entitled *Jura Ecclesiastica* [5] written by a barrister of the Middle Temple in 1742. It was written avowedly to controvert the high ecclesiastical claims put forward by Gibson; [6] and the introduction repeats in substance Foster's arguments against them.[7] It treats in five chapters of ecclesiastical persons, ecclesiastical laws, ecclesiastical courts, the subordination of the ecclesiastical to the temporal courts, and the subordination of the ecclesiastical law to the temporal law when the person or matter is ecclesiastical. The last two chapters, in which most of the topics of ecclesiastical law are treated, are the longest. But, though the information given is clearly and shortly expressed, the arrangement of the topics of ecclesiastical law under these two heads is

[1] "I must not omit to give the professors of the temporal law the acknowledgments that are justly due to them, for communicating to the publick the solemn determinations of their courts upon doubtful points, in their many learned books of reports; nor can I forbear, at the same time, to wish that the professors of the civil and canon laws had been as bountiful to the publick in the same way," Gibson, Codex Preface iii.

[2] Preface xviii; above 105-106. [3] Preface i.

[4] "It is to be lamented, that amongst the professors of the civil and canon law on the one hand, and of the common law on the other so little candour is to be found; insomuch that it can be laid down as one good general rule of interpretation, that what a common lawyer voucheth for the church, and a canonist or civilian voucheth against it, is for that very reason of so much the greater authority," Preface xx.

[5] Jura Ecclesiastica: or a Treatise on the Ecclesiastical Laws and Courts.

[6] Above 610.

[7] Above 610; the author says: "The consideration of the many attempts that have been made to extend ecclesiastical jurisdiction, and the many dangerous evils that would necessarily attend the success of such endeavours, induced me to bring together and dispose . . . all the learning I could collect to show the true rise and foundation of that jurisdiction . . . in order to detect the falsehood of the claims made by some ambitious and encroaching ecclesiasticks, to the dishonour of the Crown, the wrong of the Prerogative Royal, the degradation of the common law, to the endangering of the liberty of the subject, and in direct opposition to the true spirit even of the Gospel itself."

not very happy. It was dictated by the author's wish to protest against Gibson's claims, and to emphasize the subordination of the ecclesiastical to the temporal law.

Turning now from books upon ecclesiastical law in general to books upon special topics of ecclesiastical law, we find that, in the case of ecclesiastical law as in the case of equity and common law, the largest group is that which deals with *Practice and Procedure*. The three most famous of these books are Clerke's *Praxis*, Conset's *Practice*, and Oughton's *Ordo Judiciorum*. I shall first describe these three books, and then say something of some other less important books on these topics.

The earliest of these books of practice was written at the end of the sixteenth century by Francis Clerke—" an author of undoubted credit " [1]—who practised as a proctor at Doctors' Commons for about forty years.[2] His book on the practice of the ecclesiastical courts of the archbishop of Canterbury was first published after the author's death by Thomas Bladen at Dublin in 1664. There was a second edition in 1666; and another edition was published in London in 1684.[3] We shall see that he also wrote a book on the practice of the court of Admiralty, which was even more successful.[4] His book on the practice of the ecclesiastical courts is divided into 319 titles. Some of the principal topics dealt with in those titles are as follows: The first title deals with the days on which the courts sit; and then the three courts of the archbishop—the court of the Arches, the court of Audience, and the Prerogative court—and their styles and jurisdictions are described. An account is given of the forms of probate and grants of administration; of citations in different cases, and the procedure upon them; of the form of excommunication and the procedure upon it; of the appointment of proctors by the parties, and the forms of process and pleading; of the production of witnesses and their examination; of the examination of the defendant; of process against parties guilty of contempt; of jurisdiction against executors and administrators to compel them to account; of the rules as to *duplex querela*; [5] of the effect of the death of one

[1] Sir Henry Blount's Case (1737) 1 Atk. at p. 296 *per* Lord Hardwicke.

[2] D.N.B.

[3] Praxis Francisci Clerke, tam jus dicentibus quam aliis omnibus qui in Foro Ecclesiastico versantur apprime utilis. Per Thomam Bladen S.T.P. Decano Ardfertensim; for an account of the MS. vol. containing the practice of the ecclesiastical courts and the practice of the court of Admiralty, which is in the registry of the court of Admiralty, see E. S. Roscoe, Studies in the History of the Admiralty and Prize Courts, 12-13.

[4] Below 628-629.

[5] " Si Clericus fuit praesentatus ad Ecclesiam, et praesentationem hujusmodi exhibuerit coram Episcopo Diocaesano, seu ejus Vicario in spiritualibus generali habente potestatum instituendi, et ab eo petierit se institui, si Episcopus illum instituere et admittere recusaverit potest iste de eo querelari apud officialem de Arcubus,

of the parties to a suit; of suits as to patronage; of appeals; of the different kinds of matrimonial suits and the procedure thereon; of suits for defamation; of suits for dilapidations, and for payment of tithes; of plenary suits in which advocates must be employed, and summary suits; of rules as to exceptions to witnesses and other matters arising in the course of the proceedings; of the production of official and other documents; of suits *in forma pauperis;* of the practice when minors were parties to suits; of forms of sentences and appeals, and procedure on appeals; of execution in various classes of cases; of the procedure in criminal cases. The last title describes the forms used on the confirmation of the election of a bishop. The book is not very clearly arranged;[1] and it was carelessly and inaccurately printed from defective MSS.;[2] but it gives very detailed information upon all the topics of procedure, and, for that reason, it is the foundation of later books on this subject.

Henry Conset, who was perhaps a practitioner in the northern Province,[3] published an English book on the practice of the ecclesiastical courts in 1684.[4] Though he recognizes the authority of Clerke's book, he justly points out that the mode in which Clerke had arranged his matter was crude;[5] and he tells us that his aim was to help the learner by improving it; and also to convince the reader that the severe imputations under which the ecclesiastical laws lay were unjust.[6] The book is divided into seven parts, which, to a considerable extent, follow the order of the topics in Clerke's book. The first part deals with courts and court days, the courts of the archbishop of Canterbury, probate and grants of administration, and causes plenary and summary. The second part deals with the steps to be taken preparatory to an action, citations and the proctor's

vel Judicem Curiae audientiae, qui Judices solent rescribere in juris forma, Episcopo ad effectus subscriptos, quod rescriptum dicitur duplex querela," Tit. 84.

[1] As Conset says in his dedication to his book on the Practice of the Ecclesiastical Courts, " De Libro namque isthoc Domini Clerke inscripto . . . hocce (semota invidia, detractationeque omnimoda abjurata) sum dicere coactus, Methodum ejus perperam omnino, crudamque existere; Adolescentesve in praxi, absque bene eruditorum adminiculo interveniente pariter et inculcante, nullatenus instruere capacem."

[2] Oughton, in his preface to his Ordo Judiciorum, says that the Irish edition, " temerarie typis mandatam, omnino mancam esse et mutilatam, confusam et obscuram," and that the London edition was even more incorrect—verisimillimum enim est, quod ab authoris manuscripto originali, transumpta fuere, nonnulla exemplaria, et ab his iterum alia, donec ex multiplicata transcriptione, mendae quoque scriptorum vitio et incuria, multipliciter irrepserunt; quodque ex uno . . . vel altero (horum MSS.) minus caute transcripto, et non fideliter, cum originali, collato, hae spuriae nobis obtruduntur editiones."

[3] The dedication is dated from York, March 1, 1681; and though the book, like Clerke's, is about the courts of the Archbishop of Canterbury, in Pt. I sect. 2, there is a reference to the courts of the Archbishop of York.

[4] The Practice of the Spiritual or Ecclesiastical Courts.

[5] Above n. 1. [6] The Epistle to the Reader.

duty in relation thereto, exceptions, recusation of a judge, provocation, and appeal.[1] The third part deals with the libel, with *litis contestatio*, the defendant's answer, proofs, the conclusion, that is the close, of the pleadings, and the sentence. The fourth part deals with the procedure in summary causes, and the fifth part with appeals. The sixth part deals with the procedure in matrimonial causes; contempts; suits for accounts, legacies, and tithes; causes of defamation; *duplex querela;* suits against persons detaining a deceased person's goods; dilapidations; searches for records or writings in a public office; proof of wills in solemn form; the manner in which a corporate body is sued. The seventh part deals with criminal cases, and the manner of confirming a bishop. There is no doubt that, though much of Clerke's matter is repeated, the division of the book into parts makes it easier to follow. That it was found to be useful is proved by the fact that it reached a second edition in 1700, and a third edition in 1708. To that edition a brief account of the structure of the libel is appended, and a few cases illustrating various branches of the ecclesiastical jurisdiction, and the jurisdiction of the court of Admiralty.

Both these books were to a large extent superseded[2] by Thomas Oughton's more elaborate work, which was published in 1738.[3] Oughton was a proctor of the Arches court, and deputy registrar of the court of Delegates. He was a learned man, who spared no pains to produce a book which was scientific, accurate, and historically correct.[4] He consulted public and private muniment rooms, the records of the courts, the Cottonian MSS., and the MSS. in the Harleian library. The result of these labours was a book in two volumes, the first of which describes the practice of the ecclesiastical courts, and the second contains a collection of formularies. After the book had been finished and sent to the printers, the printing office and the MS. was destroyed by fire. But Oughton, being, as he said, "ardens et tenax," rewrote it.[5] His diligence and perseverance

[1] The term "recusation" was applied to the case where the parties, who had begun to litigate, wished to remove the case to a superior judge; the term "provocation" to the case where the parties wished to remove the case, before litigation had begun, to a superior judge; and the term "appeal" to the case where the parties wished to question the correctness of a sentence of an inferior judge, see J. F. Law, Forms of Ecclesiastical Law i note 2; for Law's book see below 617.

[2] This fact is illustrated by the later editions of Clerke's Praxis Curiae Admiralitatis, below 628-629; references are made in those editions, not to Clerke's Practice of the Ecclesiastical Courts, but to Oughton, see e.g. Tits. 46, 49, 52, 55, 62, 66.

[3] Ordo Judiciorum; sive methodus procedendi in Negotiis et Litibus in Foro Ecclesiastico—Civili Britannico et Hibernico.

[4] See his Preface to vol. i for an account of the various sources from which he drew his materials.

[5] "Nihilominus autem ardens egomet, ut fierem propositi tenax, iteratis impensis et redintegrato labore, quid depertitum (quoad potui) restauratum habere desudavi," Preface to vol. i.

were rewarded; for it became the accepted authority on the practice of the ecclesiastical courts. In 1831 the first part of the book dealing with procedure in general was translated by J. T. Law, the chancellor of the Diocese of Lichfield.[1] His translation was supplemented by extracts from Conset's book,[2] a summary of relevant passages from Ayliffe's *Parergon*,[3] and references to Gibson,[4] Burn,[5] Cockburn,[6] and Arthur Browne.[7] Therefore Law's book included, as he said,[8] "the substance of what has been written on the formularies of ecclesiastical law by the most eminent preceding writers." That it was found to be useful by practitioners is shown by the fact that it reached a second edition in 1844.

The first volume of Oughton begins with an introduction, which describes the scope of the book, and then goes on to give an account of Doctors' Commons, the court of the Arches, and the court of Audience. The scope of the book is thus described :[9]

> In the following work it is my intention to treat of ecclesiastical courts, and the days of holding them : of ecclesiastical judges : of the parties necessary to an ecclesiastical suit : and the description of cases which are subject to ecclesiastical cognizance : of causes of benefice : of criminal causes, and generally of all other ecclesiastical civil law proceedings ; whether such as originate in a superior court, or such as are brought thither from courts of inferior jurisdiction—if before the suit commences, by the process of provocation : if after suit is contested, by recusation, or by a rescript of double complaint ; if after a decree, by appeal, pleading an unjust judgment, or some grievance ; or by a commission of review. Fully and clearly explaining, as I advance, the manner of conducting these various legal processes according to the rules of ecclesiastical law : beginning with the primary citation, and proceeding regularly on through the different stages of a suit to the definitive sentence, and its execution : crowning the whole with a full description of the judicial forms necessary to be observed at the confirmation of bishops.

The first 30 sections, which are divided into 136 titles, deal with procedure in general, and they follow to a large extent the topics dealt with by Clerke and Conset, and the order in which they deal with them—all these books begin with the courts and court days, and all end with the rules observed at the confirmation of a bishop. It was this first part which was translated by Law.[10]

[1] Forms of Ecclesiastical Law ; or the mode of conducting suits in the Consistory Courts : Being a Translation of the First Part of Oughton's Ordo Judiciorum, with large additions from Clerke's Praxis, Conset on Practice, Ayliffe's Parergon, Cockburn's Clerk's Assistant, Gibson's Codex etc.

[2] Above 615. [3] Above 611. [4] Above 608.

[5] Above 612. [6] Below 619.

[7] Arthur Browne published in 1802 a compendious view of the civil law and the law of the Admiralty ; and in 1803 a compendious view of the ecclesiastical law of Ireland ; both books were founded upon lectures read in the university of Dublin.

[8] Preface. [9] The translation is taken from Law's book.

[10] In Law's translation the 136 titles of Oughton are increased by additions from the other sources used by him to 164 Titles.

The rest of the book describes the various classes of cases which came before the ecclesiastical courts, together with the procedure on appeals, and the rules observed at the confirmation of a bishop.[1] The second volume is a collection of 447 instruments or documents, which were used in different ecclesiastical transactions, arranged under the following four heads: de archiepiscopis et episcopis; de ordinibus sacris; de ecclesiis cathedralibus; de ecclesiis et capellis. Oughton tells us that, as deputy registrar of the court of Delegates, "which ought to be a model to the other ecclesiastical courts," he thought it his duty to publish a book of precedents of the acts, decrees, processes, and instruments of the ecclesiastical courts;[2] for the forms of these instruments are evidence of the law, and "firmior est etiam semper opinio quae exemplis nititur."[3]

These are the three most important books on the practice of the ecclesiastical courts. But they are by no means the only books. The following are specimens of the rest of the literature on this subject: *Clerk's Instructor in the Ecclesiastical Courts* by a Gentleman of Doctors' Commons, was published in 1740 and reached a second edition in 1766. It consists of six chapters. The first deals with defamations; the second with London customs as to wills, devises, legacies, executors and distributions;[4] the third with intestacy; the fourth with marriage, incest, impotency, etc.; the fifth with faculties, presentations, inductions, tithes, pluralities, the Admiralty; and the sixth is a short digest of cases and opinions. The general information given in Chapters I-V is very scanty, the largest part being taken up with a collection of precedents relating to the subject matter of the chapter. It is substantially a book of precedents loosely arranged under these chapter-headings. In 1744 Phillip Floyer wrote *The Proctor's Practice in the Ecclesiastical Courts*, which reached a second edition in 1746.[5] It contains elementary information as to the advocates and proctors; their dress in

[1] It consists of the following sections: de causis criminalibus (titles 137-156); de causis beneficialibus (titles 157-192); de causis matrimonialibus (titles 193-217); de causis testamentariis (titles 218-258); de causis diffamationum (titles 259-271); de recusatione judicis (title 272); de duplici querela (title 273); de appellationibus (titles 274-336); de episcopis confirmandis (title 237); there are also eight supplementary titles on various matters.

[2] "Archivorum enim Augustae Delegatorum Regiorum Curiae Custodia Parenti meo (dum egisset in humanis) demandata fuerat, et a multis abinde annis, in eodum officio de fungendo graviter incubui, in quam aliarum Curiarum Processuum et Formularum Rivuli, velut in Mare, copiosus solum demum derivari: Ideoque (dum per Otium liceret) Acta, Decreta, Processus, et instrumenta (pro virili) in Methodum aptiorem ut restituerem, Studium et Conatus impendere constitui," Preface to vol. ii.

[3] Ibid.

[4] The precedents are not confined to London.

[5] To the second edition was added an introduction to the general rules of practice, with the whole proceedings on excommunication, by Thomas Wright of Doctors' Commons; there were later editions in 1795, 1798, and 1816.

court; court days; the courts; the acts and orders of the court throughout a cause and on appeal; and some cases alphabetically digested, which form the largest part of the book. In 1753 the Rev. William Cockburn published *The Clerk's Assistant in the Practice of the Ecclesiastical Courts*, which reached a fifth edition in 1803. The author rarely cites any authorities; but his statements of the rules of procedure are clear and concise. It contains, in three appendices, a summary of the method of proceeding in the ecclesiastical courts, a collection of modern rules of practice taken from Floyer's book, and a list of fees in the Consistory courts. I have already mentioned John Mallory's book on the writ of *quare impedit*, which was of interest both to the common lawyers and to ecclesiastical lawyers.[1]

The *Testamentary Jurisdiction* of the ecclesiastical courts was in effect limited to making grants of probate and letters of administration.[2] Though in theory these courts had a jurisdiction over legacies, and over the conduct of executors and administrators, they had been practically superseded by the court of Chancery;[3] and the common law courts had always had jurisdiction over devises, and over the contractual and delictual rights and liabilities of the personal representative.[4] Therefore, even in the preceding period, both civilians and common lawyers had contributed to this literature. We have seen that the two most famous books contributed by the civilians were Swinburn's treatise on wills, and Godolphin's *Orphan's Legacy;* and that either Thomas Wentworth or Mr. Justice Dodderidge had written a good and popular book on executors.[5] All these books flourished during the eighteenth century. A seventh edition of Swinburn in three volumes, with notes by John Joseph Powell, was published in 1803;[6] a fourth edition of Godolphin was published in 1701;[7] and a fourteenth edition of Wentworth was published in 1829.[8] These later editions were brought up to date by the addition of statutes and the decisions of the common law courts and the court of Chancery. During the eighteenth century many books were written on the law of succession testamentary and intestate, and on the law of executors and administrators by common lawyers, of some of which I have already given some account.[9] The only other book

[1] Above 355.
[2] Vol. vi 652; above 279.
[3] Vol. vi 652-653; above 279.
[4] Vol. iii 585-591; vol. vii 362.
[5] Vol. v 14-15.
[6] The text is retained, and the notes are inserted at the foot of the page; they are nearly as long as the text, so that it is quite clear that a new book was needed.
[7] Many canon and civil law authorities are cited, and many common law cases, but not many Chancery cases.
[8] To the 1703 edition a supplement on administrators had been added by Curzon; but it was a somewhat disorderly collection of cases.
[9] Above 395-396.

which calls for notice here is Sir Samuel Toller's book on *The Law of Executors and Administrators*[1] which was first published in 1800, and reached a seventh edition in 1838. The author said that the best book on the subject was Wentworth's; but he criticized both its literary style and its method of arrangement. When he wrote, the last edition of Wentworth was old—it had been published in 1774, so that it did not include the latest decisions, which "at law are numerous and important, and in equity constitute a new system."[2] Toller's book is short, clear, and well arranged.[3] These books were not superseded till the publication in 1832 of Sir Edward Vaughan Williams' great work on executors.

Selden's *History of Tithes* provoked controversy in the seventeenth century;[4] and the fact that the subject of tithes has in all centuries provoked controversy and litigation, is illustrated by the publication in 1783 of a book of cases concerning tithes by John Rayner of the Inner Temple.[5] As the author said, the ecclesiastical jurisdiction over tithes was "much limited and reduced,"[6] so that the cases are all cases in the courts of law and equity. The cases in the first volume run from 1575 to 1730, in the second from 1731 to 1779, and in the third from 1779 to 1782. The third volume contains also supplemental cases from 1706 to 1753, and there is an appendix of statutes. The introduction gives a good summary of the law, and vindicates the clergy from the charge that they were too ready to litigate about their rights to tithes. Several instances are given in which clergymen had been forced to fight in defence of what was ultimately proved to be justly due to them. The book also contains an interesting collection of authorities, with full biographical and literary notes upon the authors and their books.[7]

The following textbooks on this subject also deserve notice: In the seventeenth century Sir Simon Degge had written a book entitled *The Parson's Counsellor*,[8] which was dedicated to the

[1] Sir Samuel Toller had been advocate-general at Madras.

[2] Preface.

[3] It is divided into three books—I The appointment of executors and administrators; II The rights and interests of executors and administrators; III The powers and duties of executors and administrators.

[4] Vol. v 408.

[5] Cases at Large concerning Tithes; containing all the resolutions of the respective courts of Equity, particularly those of the Exchequer. Taken from the printed Reports and Manuscript Collections mostly by Sir Samuel Dodd, late Lord Chief Baron, never before published; Together with all the Appeals in the House of Lords to one in Trinity Term 22 Geo. III. To which is prefixed an Introduction, comprehending a concise View of the whole Law of Tithes, with Observations on several cases of Appeal that have been adjudged within the last ten years of his present Majesty's reign; Likewise a full vindication of the Clergy, respecting their suits for Tithes; Also an Appendix of Acts of Parliament with Readings particularly on Stat. 13 Eliza. chap. 10 and chap. 20.

[6] Preface.

[7] Pp. i-xxxvi.

[8] The Parson's Counsellor: with the Law of Tithes and Tithing.

bishop of Lichfield, and was written at the request of some of the clergy of the Lichfield diocese. It is in two parts. The first part deals with the law on various topics which were of interest to parish priests,[1] and the second with the law as to tithes.[2] The second part was the part which interested the author, and he had at first intended to confine his book to it.[3] It is a comprehensive and clearly written book, and was very popular. It was first published in 1676, reached a sixth edition in 1703, and was republished in 1820. In 1730 William Bohun, who was a common lawyer with an anti-ecclesiastical bias,[4] published a book on tithes, which reached a fourth edition in 1760.[5] Though Bohun criticizes his predecessors,[6] he makes use of their work; and the eleven chapters of his book follow substantially the arrangement of Degge's book. It is based wholly on English authorities; but it is clearly written, and its usefulness is shown by the number of the editions through which it passed. T. Cunningham's book on this topic,[7] which reached a third edition in 1748, and a fourth edition in 1777, is a somewhat pedestrian summary of statutes and decided cases. Many of the cases are stated at considerable length. Probably one of the most useful features of the book is the alphabetical list in Chapter IV of things tithable and things not tithable.

One or two books were written on *Offences of an Ecclesiastical Character*. We have seen that Cunningham wrote a book on *Simony*.[8] A small book on the subject of *Heresy* was published by Sir Benjamin Hobhouse in 1792.[9] It gives a slight account

[1] The following are some of the topics dealt with: qualifications to become a parson; obtaining and acceptance of a benefice; pluralities; simony; institution, induction, and non-residence; dilapidations; deprivation; leases of glebe or tithes; privileges of the clergy; churches, chapels, churchyards, seats, tombs; parsonages and vicarages; resignations, exchanges, unions, and consolidations of benefices.

[2] The following are some of the topics dealt with: what tithes are; to whom payable; of what things; properties out of which tithes are payable; from what things they are not due; customs as to the payment and discharge of tithes; effect of a *modus decimandi*; conveyances and other dispositions of tithes; compositions; oblations and offerings; mortuaries; tithes in London; in what courts they are recoverable.

[3] Preface.

[4] This is shown by a pamphlet which he published in 1733 addressed to the Parliamentary Committee appointed to inquire into the abuses of the ecclesiastical courts; it is entitled A Brief View of Ecclesiastical Jurisdiction as it is at this day practised in England.

[5] The Law of Tithes; Shewing their Nature, Kinds, Properties, and Incidents; By whom, to whom, when, and in what manner payable; How, and in what Courts to be sued for and recovered; What Things, Lands, or Persons are charged with, or exempted therefrom. With the Nature, Incidents, and Effects of Customs Prescriptions, Real Compositions, *Modus Decimandi*, Libels, Suggestions, Prohibitions, Consultations, Custom of London, etc.

[6] Preface.

[7] A New Treatise on the Laws concerning Tithes: containing all the Statutes, Adjudged Cases, Resolutions and Judgments relative thereto.

[8] Above 398.

[9] A Treatise on Heresy, as cognizable by the Spiritual Courts. And an examination of the Statute 9th and 10th of William III c. 32. For the history of the law see vol. i 616-610; vol. viii 406-407.

of the history of the law, and of the statute of 1698, which penalized persons who denied the doctrine of the Trinity.[1] But it is essentially a political pamphlet in favour of toleration. The author advocates the repeal of the statute of 1698, and the abolition of the jurisdiction of the ecclesiastical courts over heresy. A book on the subject of *Immorality and Profaneness*,[2] by John Disney, vicar of St. Mary's in Nottingham, which was dedicated to Peter King, is rather an historical than a legal book. It contains a collection of the Jewish, Roman, Greek, Gothic, Lombard, and other laws on these topics from the earliest times.[3] The author had hoped to carry his collection down to modern times,[4] but he was unable to carry out his project; and his book stops at the middle of the eleventh century.

A number of books aimed at setting out more or less compendiously a summary of those branches of law which would be useful to the clergy. The most elaborate of these books is Watson's *Clergyman's Law*,[5] which was first published in 1701, and reached a fourth edition in 1747. The author was a clergyman who held the deanery of Battel; but he had been educated with a view to becoming a practitioner in the ecclesiastical courts, and had taken his degree of doctor of laws.[6] Because he had had a legal education he was, he tells us,[7] "soon apply'd to by his neighbours, as a person able to advise them in the many doubts and difficulties that daily occurred to them." For that reason

> he thought it charity and justice to spend some vacant hours in stating the tenure of ecclesiastical benefices, the capacities and incapacities of incumbents, with the method of admissions, institutions, and inductions; and in short the whole constitution of our Church and Kingdom, relating to the rights and properties of our English clergy, and the means of obtaining and defending them.

The book deals clearly and systematically in fifty-nine chapters with the law and practice on all topics which were useful to the clergy. It is a learned book; but, as the title-page indicates, it is compiled almost entirely from the English cases, statutes

[1] 9, 10 William III c. 32; vol. viii 411.

[2] A View of Ancient Laws against Immorality and Profaneness . . . collected from the Jewish, Roman, Greek, Gothic, Lombard, and other laws down to the middle of the eleventh century.

[3] The subjects dealt with are: lewdness; cursing, swearing, and blasphemy; perjury; profanation of the Lord's Day; neglect of divine service; drunkenness and tippling; gaming; idleness, vagrancy and begging; stage plays and players; duelling.

[4] Preface.

[5] The Clergyman's Law: or the Complete Incumbent, collected from the thirty-nine articles, canons, decrees in Chancery and Exchequer, as also from all the Statutes and Common Law Cases, relating to the Church and Clergy of England.

[6] Preface.

[7] Ibid.

and other authorities, to which full references are given. Though the author is an LL.D. he is obviously more learned in English law than in the civil or canon law. Another book of a similar kind is *The Clergyman's Vade Mecum*,[1] by the Rev. John Johnson (1662-1725), vicar of Cranbrook,[2] who was a learned divine of very high church principles. He wrote on theological questions; he was a learned ecclesiastical historian;[3] and, as this book shows, he knew a good deal of law. The first part of the book, he tells us, was meant to help the younger clergy—to save them from the need to spend money on lawyers, and to save them from being imposed upon by their parishioners. The information is shortly and clearly conveyed, with a few, but only a few, references to the authorities; and there is an appendix of forms, and of Acts of Parliament. The second part of the book is a work of a very different character. In the first part the author had, as he says,[4] "given an account of the state and constitution of the Church of England"; in the second he aimed at giving an account of "The state of the Church Universal down to the latter end of the eighth century." He thought that just as a well-annotated edition of the statutes would help the study of English history, so a collection of and a commentary on the codes governing the primitive church would help the study of its history and constitution. The book consists of a translation, with notes, of the canons of the primitive church;[5] and its aim is to justify, as against the Protestant dissenters, the Anglican system of church government. It is much more akin to the author's book on Ecclesiastical Laws[6] than to the first part of this book. Both parts were popular. They were first published in 1706; and the first part reached a sixth, and the second part reached a fourth, edition in 1731. A less important book is Nelson's *Rights of the Clergy*,[7] which was published in 1709. It is an abridgment of the law under alphabetical heads beginning with *Abbies* and ending with

[1] The Clergyman's Vade Mecum: or, an Account of the Ancient and present Church of England; The Duties and Rights of the Clergy; and of their Privileges and Hardships. Containing full Directions relating to Ordination, Institution, Inductions, and most of the Difficulties which they commonly meet with in the Discharge of their Office.

[2] D.N.B. [3] Below 625. [4] Preface to vol. ii.

[5] It contains: 1. The Code of the Primitive Church—the Apostolical Canons; 2. The Code of the Universal Church; 3. The Code of the Eastern Church as settled in the synod of Trullo A.D. 683; 4. The Codes of the Western Church collected by Dionysius Exiguus and others.

[6] Below 625.

[7] The Rights of the Clergy of Great Britain: as established by the Canons and the Common Law; and the Statutes of the Realm. Being a Methodical Collection under Proper Titles of all things relating to the Clergy . . . but chiefly of such things which depend on Acts of Parliament, and upon solemn Resolutions of the Judges in the Courts at Westminster; in cases concerning the Rights, Duties, Powers and Privileges of the Clergy; for Nelson's work as an editor of law reports, which was very mediocre, see vol. vi 556, 562. 617.

Visitation. Nelson is critical of his predecessors ; [1] but this book is not an improvement upon theirs. The cases are summarized, but there is seldom any clear statement of principles. It is rather too technical for the layman, and not technical enough for the lawyer.

A set of books, which are perhaps hardly law books, are closely connected with these books on clergyman's law, in that they were of very great use to the beneficed clergy. They are books which give an account of the value of livings in England and Wales, their liability to first-fruits and tenths, and the names of their patrons.[2] All these books were written by the men who had held the office of receiver of tenths and first-fruits.

At all periods ecclesiastics have written books on the history of their churches and on the sources of that history ; and these books often contain much law, more especially upon such matters as the constitution of these churches, and their formularies, and the forms of their public worship. Gibson's *Codex* is, as we have seen,[3] the most learned example of a book of this kind. But it is not the only example. Some of these books were inspired by the theological controversies of the day. Others were learned works designed primarily to increase knowledge, and incidentally to support and defend the government and tenets of the Church of England.

Two books which fall into the first of these classes are Dr. R. Mocket's *Tractatus de Politia Ecclesiae Anglicanae*, and White Kennett's *Ecclesiastical Synods and Parliamentary Convocations*. Mocket (1577-1618),[4] who was a warden of All Souls College, published his tract in 1616 in order to give foreigners an idea of the constitution of the English Church. But he adhered too closely to the ideas of archbishop Abbot, whose chaplain he had been ; and the book, being distasteful to the views of James I, was condemned and burnt in 1617 ; but its Calvinistic bias made it a popular book ; and it was reprinted in 1683 and 1705.[5] White Kennett (1660-1728),[6] bishop of Peterborough, was a Whig and a latitudinarian, who had gained a considerable reputation from his antiquarian and historical researches. His book on *Ecclesiastical Synods*,[7] which was published in 1701, was written

[1] Preface.

[2] J. Ecton, Liber Valorum et Decimarum, 1st ed. 1711, 3rd ed. 1728 ; J. Ecton, Thesaurus Rerum Ecclesiasticarum, 1st ed. 1742, 3rd ed. by Browne Willis LL.D. 1763; John Bacon, Liber Regis vel Thesaurus Rerum Ecclesiasticarum, 1786; there is an elaborately annotated copy of Bacon's work in Lincoln Inn's Library.

[3] Above 608-610. [4] D.N.B.

[5] To the 1705 ed. there are added two tracts of Zouche on the ecclesiastical law and the feudal law ; for these tracts see vol. v 18, 19.

[6] D.N.B.

[7] Ecclesiastical Synods and Parliamentary Convocations in the Church of England, Historically stated and Justly Vindicated from the Misrepresentations of Mr. Atterbury.

to support the views of Wake and Gibson [1] as to the position of convocation, as against the views of Atterbury. Though avowedly a controversial book, it is a work which shows, like Kennett's other books, learning and research.

A book which falls into the second of these two classes is John Johnson's [2] *Collection of Ecclesiastical Laws*,[3] which was published in 1720. Johnson tells us in a long preface that the objects of his *Collection* were to improve historical knowledge, to provide an antidote to Popery, to elucidate the constitution and constitutional position of the English Church, and to call attention to ancient usages which were worth restoring. The book is divided into two parts. The first part contains the ecclesiastical laws of the Anglo-Saxons and the supposed laws of Edward the Confessor. The second part begins with the canons of Lanfranc, and contains the canons of the archbishops down to those of Morton in 1486. The last document is a rescript of Leo X to archbishop Warham in 1519. The documents in the two parts are translated and furnished with explanatory notes. It is a learned work, and must have been useful both to ecclesiastics and lawyers. Another book of the same character is a collection of tracts relating to the clergy, which was published by Samuel Brewster in 1752.[4] The tracts, which were collected partly by his father [5] and partly by himself, comprise a treatise on tithes by Bryan Walton, bishop of Chester, two treatises as to the grievances of the London clergy in the early years of the seventeenth century, two charters of William I and II elaborately annotated, an essay on the office of parish clerk, and a charter of 15 Edward IV incorporating the principal clerks of collegiate and parish churches in London.

[1] Above 607. [2] Above 623.

[3] A Collection of all the Ecclesiastical Laws, Canons, Answers, or Rescripts, with other memorials concerning the Government, Discipline, and Worship of the Church of England, from its first foundation to the Conquest, that have hitherto been published in the Latin and Saxonic tongues. And of all the Canons and Constitutions Ecclesiastical made since the Conquest and before the Reformation, in any National Council, or in the Provincial Synods of Canterbury and York, that have hitherto been published in the Latin tongue. Now first translated into English with explanatory Notes, and such glosses from Lyndwood and Athona, as were thought most useful.

[4] Collectanea Ecclesiastica: Being a Collection of very curious Treatises in manuscript relating to the Rights of the Clergy of the Church of England, and especially of those who are beneficed in London. To which is subjoined a large Appendix containing several Original Papers, Records, etc. Illustrated with Notes and interspersed with Dissertations, concerning the Original and Extent of the Office and Authority of Archdeacons and Rural Deans in England. Concluding with an Essay on the Office and Duties of Parish Clerks.

[5] His father also wrote a tract entitled Jus Feciale Anglicanum, below 630, n. 1.

Admiralty and Prize Law.

The literature of these topics is scanty. In the latter part of the seventeenth century the controversy with the common law courts as to the extent of the Admiralty jurisdiction, though practically settled in favour of the common law courts, still lingered on, and coloured the literature of these topics.[1] But, by the beginning of the eighteenth century, the controversy had been finally settled in favour of the common law courts; and, since the court of Admiralty was left with but a small part of the jurisdiction which it had exercised in the sixteenth and early seventeenth centuries,[2] it is not surprising that the civilian literature on the subject of maritime law is scanty. In fact the chief books come from the latter half of the seventeenth century. On the other hand, it was recognized in the eighteenth century that the court of Admiralty had an exclusive jurisdiction in prize.[3] But this topic is closely related to international law, since it is international law that the prize court administers;[4] and it is closely connected with the policy of the state.[5] Since prize cases were not regularly reported, it was difficult to get information as to the principles upon which the court acted.[6] It is therefore not surprising to find that it is not till Lord Stowell had settled the principles of the prize jurisdiction in a series of reported cases, that it was possible to write a satisfactory book upon this branch of the jurisdiction of the court of Admiralty.

In 1664 John Exton, the judge of the court of Admiralty,[7] wrote a book on *The Sea Jurisdiction of England*.[8] Like Godolphin's book,[9] it is mainly concerned with proving the court's right to a wider jurisdiction than that permitted to it by the common lawyers, and the expediency of allowing it this wider jurisdiction. The treatise is divided into three books. The first deals with the origins of the court's jurisdiction; the second endeavours to prove that ports, havens, and creeks of the sea are within the jurisdiction of the court; and the third, to prove that all contracts concerning maritime affairs are within the court's jurisdiction. Exton presents a clear and cogent argument in favour of the jurisdiction of his court. In the course of it he has a good deal to say of the Laws of Oleron and other rules of maritime law; and so, although the book was an argument for a lost cause, the fact that it contained a good history

[1] Vol. i 554-558; vol. v 12, 143, 152-154. [2] Vol. i 557-558.
[3] Ibid 563-566; Le Caux v. Eden (1781) 2 Dougl. 594; Lindo v. Rodney (1783) 2 Dougl. 613; above 606.
[4] Vol. i 565; Lindo v. Rodney (1783) 2 Dougl. at p. 616.
[5] Vol. i 567-568; below 653, 656. [6] Below 694. [7] D.N.B.
[8] The Maritime Dicaeologie, or Sea-Jurisdiction of England set forth in Three several Books.
[9] Vol. v 12.

of the court and its jurisdiction, and of some of the rules of maritime law, made it so useful that new editions were issued in 1741, 1746 and 1755.

I have already given some account of Charles Molloy's book *De Jure Maritimo et Navali*, which was first published in 1676.[1] We have seen that it is a book which deals with international as well as with maritime and commercial law. It deals also with naval and military discipline, and with the prize jurisdiction of the Admiralty. That it was a successful book can be seen from the fact that it reached a tenth edition in 1778. The later editions were kept up to date by the addition of statutes and relevant cases. It is easy to see why it was a popular book. It gave shortly and clearly information upon many topics of commercial law, such as insurance and bills of exchange; upon many topics of maritime law, such as the rights of the owners of ships, the legal position of the master and mariners, freight, demurrage, charter parties, bottomry, average; upon many topics of international law, some of which were closely connected with the instance or prize jurisdiction of the court of Admiralty, such as privateers, letters of marque and reprisal, piracy, treaties, the position of neutrals, the rules as to the treatment of the goods of friends on enemy ships, and the goods of enemies on friends' ships. Though it contains information upon many topics which we are accustomed to regard as very disparate, there is a bond of union between them, which consists in the fact that they are all connected, more or less closely, with the different branches of law which fell within the jurisdiction of the court of Admiralty, with many closely connected topics of international law, and with many closely connected topics of the commercial law, which had been appropriated by the common lawyers. The poverty of the literature on many of these topics made it a useful book both to the civilians and the common lawyers.

In 1746 there was published anonymously a book in two volumes entitled *The Laws Ordinances and Institutions of the Admiralty of Great Britain, Civil and Military.*[2] It was written for the use of officers of the navy and merchant service, and for traders of all kinds. It is not therefore primarily a law book; but it gives a good deal of information on various topics of maritime

[1] Vol. v 131.

[2] The Laws, Ordinances, and Institutions of the Admiralty of Great Britain, Civil and Military. Comprehending: I Such antient Naval Laws and Customs as are still in Use. II An Abstract of the Statutes in Force relating to Maritime Affairs and Commerce. III The Marine Treaties at Large. IV A Critical Account of Naval Affairs and Commerce from the Reign of Alfred the Great. V The Present State of the Navy, and of the Officers, Offices, Ships, etc., thereof. Interspers'd with Dissertations, Notes, and Comments for the Use of Officers of the Navy, Masters of Ships, Mariners, Merchants, Insurers, and the Trading Part of the Nation in general.

and prize law. The first volume is divided into nine sections. The first two, on the Dominion of the Sea and Naval Institutions of the Ancients, are historical. The third gives some account of the laws of Oleron, Rhodes, Wisby, and the Hanse Towns. The fourth and fifth give an account of the jurisdiction of the Admiralty, with a few select cases, and some general remarks on the state of maritime jurisdiction in England. The sixth deals with letters of marque, privateers, and piracy; the seventh with charter parties, bottomry, and insurance; and the eighth with the question what ships are English and what foreign, and some cases which had arisen relating to these two classes of ships. The ninth and longest section abridges the statutes relating to the Admiralty, naval affairs, and commerce. The second volume contains the "Marine Treaties" from 1661-1728, a history of naval affairs from the reign of Alfred, and an account of the present organization of the navy. The only parts of the book which are useful to lawyers are sections 3-9 of the first volume, and the information given in those chapters is sketchy and adapted to the use of laymen rather than lawyers. That it was useful to the persons for whom it was written can be seen from the fact that a second edition was published in 1767.

A very much more important book to the lawyers is Clerke's *Practice of the Court of Admiralty*.

Francis Clerke, who wrote the earliest book on the practice in the ecclesiastical courts,[1] also wrote a much shorter book on the practice of the court of Admiralty,[2] which had a longer life. It was first published in 1667 long after the author's death.[3] There was a second edition in 1679, and a third edition in 1722 in Latin and English. A fourth edition was published in 1743,[4] and a fifth in 1798. To the fourth and subsequent editions there was appended the Articles of Master Rowghton. These articles were taken from the Black Book of the Admiralty, and contained the matters to be inquired of by maritime inquests.[5] A fifth edition containing the Latin text and a translation, together with notes and references to other authorities, was published in 1829. The book is divided into sixty-eight titles, which describe the various stages in a suit in the court of Ad-

[1] Above 614-615.

[2] Praxis Supremae Curiae Admiralitatis Francisci Clerke; see E. S. Roscoe, Studies in the History of the Admiralty and Prize Courts, 13-16.

[3] Mr. Roscoe, op. cit. 14-15, gives reasons for thinking that the author intended to publish the book, and that he did not intend it only for his private use; but, till it was published, it was much sought after and copied by practitioners; in the seventeenth century both Thomas Eden (Coote, English Civilians 73) and Wiseman, below 640, had copies, L.Q.R. xxxvii 329 n. 4.

[4] This edition was by Dr. Simpson, and he dedicated it to Sir George Lee, below 666-669.

[5] Vol. v 125-126.

miralty from its beginning to its end. It is much shorter than the author's earlier book on the practice of the ecclesiastical courts, because the rules applicable in the ecclesiastical courts were in many cases the same as those in the court of Admiralty, so that only a reference to these rules were needed.[1] As we have seen,[2] in the later editions these references were made to Oughton's book on this subject, which had superseded Clerke's. It is a very important book because it continued to be the leading book on the practice of the court right down to the new rules of practice which were formulated in 1859.[3]

Some information as to the topic of prize law is contained in Molloy's book, and in *The Laws and Institutions of the Admiralty*. But, apart from books which contain collections of statutes relating to the Admiralty,[4] and a short tract on proceedings in prize cases,[5] there is nothing relating specifically to prize law. The law relating to these cases was contained in books on international law, such as the discourses on the conduct of the government in respect to neutral nations prefixed to Charles Jenkinson's collection of treaties.[6]

Martial Law.

When the law applicable to the army was administered by the court of the Constable and Marshal,[7] it fell within the sphere of the civilians' practice.[8] But in the eighteenth century, that court was obsolete. Jurisdiction over soldiers was vested in courts martial held under the authority of the Mutiny Acts and the Articles of War;[9] and though the law administered by these courts was still called martial law,[10] it had come to depend solely upon those Acts, and the Articles of War authorized either by those Acts or by the prerogative or by the statutory powers of the Crown.[11] This radical change is reflected in the literature of the subject. At the beginning of the century a book was written or projected by John Anstis of the Middle

[1] See e.g. Tit. 52.
[2] Above 616 n. 2.
[3] "The Admiralty Practice held the field until much of the procedure in it, owing to its technicality and its length, became unsuitable to a tribunal concerned with straight-forward maritime disputes in increasing numbers. Admiralty procedure thus fell into a disorganized state, from which it was rescued by the Rules of 1859, containing a certain amount of the old procedure modified so as to be in harmony with modern requirements, and these form the basis of the Admiralty practice which is to be found in the Judicature Rules," Roscoe, op. cit. 14.
[4] Collections of statutes relating to the Admiralty, the Navy, and incidental matters were published in 1742, 1755, 1757, and 1768, Leslie F. Maxwell, A Bibliography of English Law ii 107.
[5] Observations on the course of Proceedings in Admiralty Courts in Prize Cases 12° 40 pp. 1747, ibid.
[6] Below 638.
[7] Vol. i 573-580.
[8] Vol. iv 238; vol. v 15-16.
[9] Vol. x 378-380.
[10] Ibid 710.
[11] Ibid 378-379, 710.

Temple upon the court of the Constable and Marshal.[1] It was to consist of three books—the first dealing with the court and its judges and officers, the second with its jurisdiction, and the third with its procedure. Each book was to be divided into chapters, and there was to be an introduction dealing with the office of the Earl Marshal. If the book was ever written, it was purely of antiquarian interest. The place of books of this kind was taken by collections of the statutes relating to the army or militia,[2] or by books on courts martial. Adye's book on the latter subject has already been noticed.[3] It was supplemented in 1784 by R. J. Sulivan's *Thoughts on Martial Law*[4] which deals with the procedure of a general court martial, and with courts of inquiry. The book is at times a little rhetorical in its style; and the two senses of the term martial law are confused. But it was probably useful to the officers for whom it was intended.

International Law.

In the sixteenth and early seventeenth centuries the works of Gentili,[5] Zouche,[6] and Selden[7] make a considerable contribution to the literature of the new topic of international law. In the eighteenth century no English writer made any considerable contribution to the literature of this topic. The important literature is continental. It is true that the civilians and some few English lawyers, and more especially those lawyers who became the law officers of the Crown, studied this continental literature in order to be able to advise the Crown on

[1] Curia Militaris: or a Treatise of the Court of Chivalry; in Three Books. I Concerning the Court itself; its Judges and Officers. II Of its Jurisdiction and Causes there determinable. III Of the Process and Proceeding therein: With an Introduction containing some animadversions on two Posthumous Discourses, concerning the Etymology, Antiquity, and Office of the Earl Marshal of England, ascribed to Mr. Camden, and Published in his last Edition of the Britannia. All we have of the book is the Table of Contents; as suggested in a note to the British Museum copy it may only have been printed for private use. A curious book entitled Jus Feciale Anglicanum: or a Treatise on the Laws of England relating to War and Rebellion, by Samuel Brewster (1725), is a rambling and rather muddled tract, dealing with the subject from the point of view of international law; it appears that Brewster was retained to defend one of the prisoners taken in the 1715 rebellion and indicted for high treason; apparently he wished to contend that the terms on which his client had surrendered were in some way a bar to an indictment. Parker C.J. naturally refused to listen to this defence, and the book is accompanied by a preface in which the author tries to maintain that he had been badly treated by Parker because he had not been allowed to conduct his defence in his own way.

[2] E.g. Law Military; or a methodical collection of Laws relating to the Army and Soldiery of Great Britain, and also of the Navy Royal (1719); R. Burn, Digest of Militia Laws (1760).

[3] Above 347.

[4] Thoughts on Martial Law, with a mode recommended for conducting the Proceedings of General Courts Martial inscribed to Gentlemen of the Army (1784).

[5] Vol. v 52-55. [6] Ibid 58-60. [7] Ibid 10-11.

diplomatic questions, and, in time of war, in order to support or oppose the claims made in the prize court. It is true that decided cases recognized that international law was a part of the law of England,[1] and that this recognition of the binding force of its rules was stated and explained by Blackstone.[2] But though both the civilians and the English lawyers recognized and applied its rules, both of these two classes of lawyers were content to rely upon the continental authorities.

The continental literature shows that international law was being rapidly developed, partly by the arguments in, and the decisions of, the disputes which arose between the nations of Europe, partly by the provisions of treaties which helped to give precision to international usages, and partly by the juristic speculations of the important continental writers. In the first place, it is clear that two different schools of international law were arising—the philosophical school which based the law wholly or chiefly on deductions drawn from the law of nature, and the historic or positive school which based the law on the usages and customs actually observed by the nations of Europe. In the second place, as the result of this speculation and the growing precision of international usages and customs, international law was becoming more clearly differentiated from allied branches of law, and was beginning to assume its modern shape.

(1) *The two schools of international law.*

We have seen that in the sixteenth and early seventeenth centuries Gentili and Zouche, the earliest English writers on international law, had favoured the historic or positive treatment of international law.[3] On the other hand, we have seen that Grotius, the true founder of modern international law, had, without neglecting the actual rules observed by modern nations, emphasized its philosophic basis.[4] I shall, in the first place, say something of the writers of the latter part of the seventeenth and the eighteenth centuries, who developed the philosophic basis of international law; and in the second place, of writers of the historic or positive school.

(*i*) The chief exponents of the philosophical school are Pufendorf, Wolff, and Vattel.

Pufendorf (1632-1689),[5] professor of the law of nature and

[1] Vol. x 372. [2] Ibid 373. [3] Vol. v 54, 59. [4] Ibid 56-57.

[5] Les Fondateurs du Droit International 331-383; Wheaton, History of the Law of Nations 88-99; his principal work was Juris Naturae et Gentium Libri VIII published in 1672, and an abridgment published in the following year entitled De Officiis Hominis et Civis prout ipsi praescribuntur Lege Naturali; two other books in which international law is incidentally treated are De Officio Hominis et Civis, and Elementorum Jurisprudentiae Universalis Libri Duo; both have been reproduced with translations and introductions in the Carnegie classics of international law.

nations at Heidelberg, and later professor of jurisprudence at Lund, was a whole-hearted supporter of this school. He adopted Hobbes's view that the law of nations is the law of nature as applied to states, and said that he recognized "no other sort of law of nations voluntary or positive."[1] Positive rules introduced by the consent of nations were, in his eyes, less binding rules which ceased to apply if the consent were withdrawn. Thus he based the whole of the law upon the rules dictated by the law of nature. In fact, the part of his book dealing with international law is but a small part of his general exposition of the legal and moral duties which the law of nature prescribes to all men.[2] But it was these speculations which gave his works their influence over succeeding writers, including the writers of the article *Droit des Gens* in the French Encyclopædia.[3] Though it cannot be said that he did much to develop the principles of international law as expounded by Grotius, yet the indirect influence of Pufendorf, and other writers of his school was not inconsiderable, because their works, though defective as treatises on international law, helped to promote the ideals of humanity, peace, and justice as between nations.[4] But because it was not an exposition of the rules of international law but of the rules of the law of nature, which was the main object of Pufendorf's books, their influence was greater and more lasting upon writers upon jurisprudence, who, like Burlamaqui,[5] founded their systems upon an exposition of the implications of a supposed law of nature.[6]

Wolff[7] (1679-1754) was professor at Halle. He was a mathematician and a philosopher of the school of Leibnitz. His work on international law is part of a larger work in nine volumes on jurisprudence and international law;[8] and that part of his work which deals with international law is more clearly set forth in his smaller book on the *Jus Gentium*.[9] Wolff separated, more clearly than Pufendorf, that part of the law of nature which deals with the relations of states, from that part of it which deals with the relations of individuals; and he recognizes the binding force of "the voluntary part" of the law of nations which rests on their consent.[10] The binding force of this voluntary law of nations he derived from the fiction of a common-

[1] Juris Naturae Bk. ii c. 3 § 23, cited Wheaton, op. cit. 93.
[2] Below 643.
[3] Wheaton, op. cit. 98; Les Fondateurs du Droit International 381-382.
[4] Wheaton, op. cit. 98.
[5] Below 642-643.
[6] For this school see Pollock, Essays in Jurisprudence and Ethics 18-30.
[7] Les Fondateurs du Droit International 447-479; Wheaton, op. cit. 176-182.
[8] Jus Naturae Methodo scientifico pertractatum.
[9] Institutiones Juris Naturae et Gentium.
[10] "Cette législation, Wolff l'appelle le *Droit des gens volontaire*. Ses rapports avec le droit des gens *naturel* ou *nécessaire* sont les mêmes que ceux du droit positif des nations isolément considerées avec le droit naturel," Les Fondateurs du Droit International 460.

wealth of nations (*civitas gentium maxima*), instituted by nature, of which all states were members, and to the laws of which all nations had consented.[1] He denies that agreements between particular nations or the usages of those nations have any effect in creating a positive law of nations. They make a conventional law valid only as between the contracting parties. On the other hand, the usages of nations may make a customary law of nations, but a law which is only valid as between those nations who have adopted the usages.[2] Vattel says of Wolff that he was the first to see that the rules of the law of nature must be modified when they come to be applied to states, and that international law was therefore a distinct and particular department of the law of nature.[3] But Wolff's books were hard to read. They were often expressed in mathematical terms, and were not easily intelligible without a preliminary acquaintance with the philosophical doctrines of their author. It was for that reason that Vattel set himself to write a book, based on Wolff, which should be more intelligible to lawyers and statesmen.[4]

Vattel[5] (1714-1767) throws over Wolff's deduction of the binding force of the rules of international law from a fictitious consent to a fictitious *civitas maxima*. Such a fiction, he rightly said, was incompatible with the sovereignty of the modern state.[6] He regards international law as being in its origin simply the law of nature as applied to nations, which must be very different from the law of nature as applied to individuals.[7] This is the necessary and immutable part of international law. In addition there is the voluntary law of nations derived from their presumed consent; and, like Wolff, he recognizes also a conventional and a customary law of nations.[8] Vattel's book was based on Wolff; but the book is written in an easy and intelligible style; and its philosophy is tempered by examples taken from modern history, which bring his work into touch with modern conditions.[9] It is true that his philosophy and his historical examples are not too skilfully blended.[10] But because

[1] Les Fondateurs du Droit International 459-460; Wheaton, op. cit. 177-179.
[2] Ibid 180, 182; Les Fondateurs du Droit International 461-462.
[3] Wheaton, op. cit. 183.
[4] Vattel's preface to his Droit des Gens, cited Wheaton, op. cit. 183-185.
[5] Les Fondateurs du Droit International 481-601; Wheaton, op. cit. 182-189; for a list of his works see Les Fondateurs etc. 486-488; his famous book is Le Droit des Gens ou Principes de la Loi Naturelle appliqués à la Conduite et aux Affaires des Nations et des Souverains, first published in 1758; for the many subsequent editions see ibid 488-490.
[6] Les Fondateurs du Droit International 504.
[7] Wheaton, op. cit. 186-187.
[8] Ibid 187-189.
[9] Les Fondateurs du Droit International 594.
[10] "Il a en surtout le tort de ne pas tirer parti, comme il aurait dû, des matériaux positifs ainsi rassemblés. Il n'a pas su concilier et fondre en un ensemble harmonieux et équilibré les faits positifs de la vie internationale et les formules théoriques de la philosophie de Wolff," ibid.

it was a book which could be understood by politicians, and gave practical information as to the customary usages of states in their dealings with one another, it became the handbook of diplomats and their governments ; [1] and because in his treatment of war it is marked by a humanity, in advance not only of past ages, but of his own, it helped to introduce the modern humanitarian ideas.[2] It is for those reasons that Vattel's book attained a popularity which is in some degree comparable with Grotius's great work.

(*ii*) The use which Vattel makes of examples taken from modern history brings his work into relation with writers of the historical school. The chief exponent of this school in the late seventeenth and early eighteenth century is Bynkershoek [3] (1673-1743), who was an advocate, a judge of the court of appeal at the Hague, and finally the president of that court. Reason and usage he considered to be the foundations of international law. But it is chiefly in usage that the rules of international law must be sought.[4] The title of his most famous book *Quaestiones Juris Publici* illustrates his point of view. "Instead of undertaking, after the example of Grotius and Pufendorf, an entire code of international law, he selected for a more thorough discussion the particular questions deemed most important and of most frequent occurrence in the intercourse of modern nations." [5] Thus he examines more fully than any previous writer the problems arising from maritime commerce between neutrals and belligerents ; and bases his rules on treatics and recent usage.[6] Similarly he bases his view as to the position of an ambassador on reason and the usage of nations.[7] A still more extreme exponent of this historical or positivè school was Moser (1701-1785), who wrote a book on international law which was based solely upon modern examples, beginning with the year 1740.[8] His view was that, since little regard was paid to abstract principles of justice by statesmen, treaties and usage must be regarded as the sole foundations of international law. A succession of treaties go far, he thought, to establish a rule,

[1] "Son livre n'est ni un ouvrage de doctrine comme celui de Pufendorf ou de Wolff, ni une oeuvre de polémique comme celle de Selden ou de Bynkershoek ; il est un manuel de politique, une encyclopédie pratique et positive à l'usage des hommes publics et a ce point de vue (mais a ce point de vue seulement), on peut le comparer au *De jure belli :* il eut, un siècle plus tard, la même utilité pour les gouvernants et les diplomates," Les Fondateurs du Droit International 582-583.

[2] "Si l'on compare la théorie de Vattel à celle de ses prédécesseurs et en particulier à celle de Grotius il faut reconnaître qu'elle constitue un progrès énorme au point de vue humanitaire et qu'elle est, . . . le dernier degré de la transition des idées anciennes aux idées modernes," ibid 570.

[3] Ibid 385-446 ; Wheaton, op. cit. 191-196 ; his two most important works are Quaestiones Juris Publici, and De Foro Legatorum.

[4] Wheaton, op. cit. 194-195, 196. [5] Ibid 193.

[6] Ibid. [7] Ibid 194-195, 241. [8] Ibid 322-324.

and precedents must be looked at to establish a usage. "The rule must be inferred from examples, and not applied *a priori* to test the validity of a particular precedent." [1]

De Martens (1756-1822) [2] was a less extreme adherent of this school. He was successively professor at Göttingen, councillor of state in Westphalia, and representative of the kingdom of Hanover at the Diet of the German confederation. He based the principles of international law on treaties and usage, but he also recognized the authority of natural law when those authorities were silent.[3] His work illustrates two prevailing tendencies in the development of international law. In the first place, it illustrates the tendency of the two schools to approach nearer to one another. Neither Wolff nor Vattel had followed Pufendorf in basing the rules of international law solely on the law of nature; [4] and Vattel had illustrated his theories from modern cases.[5] Secondly, it illustrates the tendency, which was followed up in the nineteenth century, to base the rules of international law on usage, which is proved by the rules actually obeyed, rather than on the consideration of the rules which ought theoretically to be obeyed.[6] No doubt the weight attached by the older writers to the law of nature, and to the deduction from that law of the rules which ought theoretically to be obeyed, was necessary and useful in the infancy of international law; but the weight attached to the law of nature and to deductions drawn from it gradually but inevitably declined as the ground came to be more completely covered by the more precise and detailed rules established by the positive usages of nations.

(2) *The growth of modern international law.*

It was during the eighteenth century that the topic of international law was differentiated from other bodies of knowledge and other branches of law; and that the topic itself ceased to be primarily concerned with the topic of war. Both these developments were due partly to the growth of the idea that the precepts of that part of the law of nature which prevailed as between states were different from the precepts of that part of it which prevailed as between individuals, and partly to the growth of the ideas of the historical and positive school.

[1] Wheaton, op. cit. 324.

[2] Les Fondateurs du Droit International 603-676; Wheaton, op. cit. 325-328; he wrote many books, but his most important book is his Précis du Droit des Gens Moderne de l'Europe, first published in 1788—"traduit dans presque toutes les langues, commenté par les publicistes, et estimés longtemps comme le traité le plus complet du droit des gens," Les Fondateurs 604.

[3] Ibid 605. [4] Above 632. [5] Above 633.

[6] Oppenheim, International Law (1st ed.) 92.

The parts of Pufendorf's book *De Jure Naturae et Gentium* which deal with international law are comparatively small.[1] It is, it has been said, a *corpus* of the *jus naturale;* [2] and therefore it is as much a book of jurisprudence and ethics as a book on law. The part of the book which deals with international law " comprises the five last chapters of the eighth book, consisting of little else than a mere compilation from Grotius and his commentators." [3] The distinction drawn by Wolff and Vattel between that part of the law of nature which deals with the relations of states, and that part of it which deals with the relations of individuals, and their admission that some of its rules were based on consent and usage,[4] helped to differentiate the topic of international law from the topics of jurisprudence and moral philosophy. This differentiation was emphasized by the work of writers of the historical school. They concentrated their attention on the usages of nations; they found the proof of those usages in the events and disputes which had actually occurred; and they only appealed to the law of nature if international usage and practice were silent.[5] Thus the law of nature gradually retired into the background, and, with it, that confusion between international morality and international law which the earlier association of the law of nature with international law had fostered.

We have seen that the earliest books on international law were books which dealt mainly with the law of war; [6] and the topic of war long continued to retain its importance. Even Grotius's book was concerned mainly with the laws of war.[7] But Zouche had broken away from this tradition by his division of the subject into the topics of peace and war; [8] Pufendorf had dealt very shortly and summarily with war; [9] and Wolff and Vattel subordinated their treatment of the state of war to their treatment of the normal relations between nations, and reduced war to the position of a mere incident in international life. In Vattel's book the topic of war occupies only one of his four books, and is regarded as a temporary condition of affairs which disturbs the pacific relations of nations.[10] But as yet international law was not very clearly differentiated from constitutional or public law; nor was the topic of neutrality very clearly envisaged. Wolff has much to say of the origins of society and of the state; [11] and the whole of Vattel's first book deals with matters of public law, which had very little connection with international law.[12] This confusion does not appear in writers

[1] Les Fondateurs du Droit International 336.
[2] Ibid.
[3] Wheaton, op. cit. 97.
[4] Above 632, 633.
[5] Above 634-635.
[6] Vol. v 9, 28-29.
[7] Ibid 57.
[8] Ibid 59.
[9] Les Fondateurs du Droit International 587 n. 3.
[10] Ibid 587-588.
[11] Ibid 456-458.
[12] Ibid 509.

of the historical or positive school, because they concentrated their attention on the actual relations between nations. Thus De Martens does not discuss the structure of the state, but "the reciprocal rights of states in relation to their constitution and internal government." [1] He deals with such matters as state sovereignty and its consequences, the rights of the state over foreigners, the effect which should be given to foreign law and foreign judgments, and extradition.[2] Similarly we have seen that it was the writings of Bynkerschoek which helped to elucidate some of the most important parts of the law of neutrality [3]—those parts which are concerned with the trade between neutrals and belligerents; and the topic of neutrality was still further elucidated by Hübner's work *De la Saisie des Bâtiments Neutres* which was published in 1759.[4] Thus by the end of the eighteenth century international law had been differentiated from constitutional law, and it was recognized that its three great departments were the departments of Peace, War, and Neutrality.

The fact that the civilians and English lawyers kept abreast of those developments in international law is shown by the opinions which they gave to the government—notably the famous opinion of Lee, Paul, Ryder, and Murray on the question of the Silesian loan.[5] It is also shown by the fact that the famous books on international law appear in the catalogues of the libraries of the Inns of Court,[6] and by the fact that, during the eighteenth century, many of them were translated into English. In 1710 Pufendorf's *Law of Nature and Nations* with Barbeyrac's notes was translated into English by Basil Kennet, and a fourth edition of the translation was published in 1729. In 1716 Wicquefort's book on the ambassador and his functions was translated by John Digby. In 1759 a large part of Bynkershoek's *Quaestiones Juris Publici* was translated; and in 1759 a new and enlarged translation, with notes on modern developments, was published by Richard Lee, with the title of

[1] Les Fondateurs du Droit International 631.

[2] Ibid 632-640. [3] Above 634.

[4] Wheaton, op. cit. 219-228; Bynkerschoek, Quaestionum Juris Publici (Classics of International Law), ii Introd. xlii.

[5] Above 469-470; for two opinions of Sir James Marriott see below 675-676; in 1770 he gave an opinion that if the subjects of neutral Powers hired ships to carry soldiers and munitions of war to belligerents, the purpose of the hiring made the act a breach of neutrality in the neutral subject, but not in his state, so long as the hiring was not authorized by the state, and so long as the state had not been required by the belligerent to prohibit such acts, Calendar of Home Office Papers 1770-1772, 55.

[6] Lincoln's Inn Library has early editions of the works of Pufendorf, Wolff, and Bynkershoek; it has not got an early edition of Vattel's book on international law, but it has his "Questions de Droit Natural et Observations sur le Traité du Droit de la Nature de M. le Baron de Wolff," published at Berne in 1762.

A Treatise of Captures in War.[1] In 1797 Vattel's book was translated. In 1801 T. H. Horne translated De Martens' essay on privateers, captures, and recaptures, and added to it a summary of the law as to the rights and duties of neutral Powers. In 1802 William Cobbett translated De Martens' book on international law.

But the English literature on the subject is inconsiderable. Two small tracts were written in 1757 and 1759 on matters of current interest. In 1757 Charles Jenkinson,[2] who became the first Earl of Liverpool, published *A Discourse on the Conduct of the Government of Great Britain in respect to Neutral Nations;*[3] and in 1759 James Marriott, afterwards the judge of the court of Admiralty,[4] published a tract entitled *The Case of the Dutch Ships Considered.*[5] Both were written to defend the rule of the war of 1756, under which Dutch ships, permitted by France to engage in trade with her colonies during the war, were held to be liable to capture;[6] and to support the view that enemy property on neutral ships was liable to seizure. Jenkinson also published in 1785 a collection of treaties 1648-1783.[7] "To the statesman," said the author,[8] "it is a code, or body of law; since a collection of treaties is to him of the same use that a collection of the statutes is to a lawyer." There is an interesting chapter on international law in Rutherforth's *Institutes of Natural Law;* but this book is a book on jurisprudence, the object of which is to set out the rights and obligations of men as individuals and as members of civil societies.[9] The only other book that need be noticed is Robert Ward's[10] *Enquiry into the Foundation and History of the Law of Nations in Europe.*[11] The author tells us that he had projected a "Treatise of Diplomatic Law";[12] but that he had abandoned it in favour of a work upon the nature and source of the obligation of international law, and the history

[1] There was a second edition in 1803. [2] D.N.B.
[3] This discourse was prefixed to the author's collection of treaties.
[4] Below 674-676. [5] It reached a fourth edition in 1778.
[6] There is some reason to think that this rule was applied in the war of 1744-1745, Marsden, Law and Custom of the Sea (Navy Records Soc.) ii 436.
[7] A Collection of All the Treaties of Peace, Alliance, and Commerce, between Great Britain and other Powers, from the Treaty signed at Munster in 1648 to the treaties signed at Paris in 1783.
[8] Preface. [9] For this book see below 643.
[10] D.N.B.; Ward (1765-1846) was a barrister, a politician, under-secretary for foreign affairs, lord of the Admiralty, clerk of the Ordonnance, and a novelist; in 1801 he published a short book entitled A Treatise of the Relative Rights and Duties of Belligerent and Neutral Powers in Maritime Affairs: in which the Principles of Armed Neutralities, and the Opinions of Hübner and Schlegel are fully discussed; and in the same year an "Essay on Contraband," which was a continuation of the last-named book.
[11] An Enquiry into the Foundation and History of the Law of Nations in Europe, from the Time of the Greeks and Romans to the Age of Grotius.
[12] Preface iv.

of the international usages of the nations of Europe down to the time of Grotius.[1] The first part of the book is devoted to proving that men's ethical ideas at different times and in different places are so divergent that there can be no universal law of nations; but that the similarity in the ethical and religious ideas of European nations made a law of nations possible as between them. The second part of the book is devoted to an historical exposition of the rules which these nations have actually observed in their intercourse with one another. It is a learned book, though somewhat diffuse and loosely constructed; but it deserves to be noticed because it is the only attempt of an English lawyer in this century to write a treatise upon two important matters which must be considered by students of international law—the nature and source of its authority, and its history.

Roman Law and Jurisprudence.

The differences in the training of the English lawyers and the civilians tended to accentuate the differences between these two classes of the legal profession. The training of the practitioners in the courts of law and equity was wholly practical: the training of the civilians was partly academic and partly practical. No civilian could be admitted as an advocate at Doctors' Commons unless he had taken the degree of doctor of law of Oxford or Cambridge.[2] This rule had three important consequences. In the first place, the relations between the advocates and the Universities were close. In the sixteenth century (to mention only a few examples) Dr. Hervey, one of the founders of Doctors' Commons and dean of the Arches, was master of Trinity Hall;[3] and Dr. Lewes, the judge of the court of Admiralty, was a fellow of All Souls and the first principal of Jesus College, Oxford.[4] In the seventeenth century, Leoline Jenkins, the judge of the court of Admiralty, was also principal of Jesus College.[5] In the eighteenth century, George Oxenden, George Bramston, Nathaniel Lloyd, James Marriott the judge of the court of Admiralty, and William Wynne were masters of Trinity Hall;[6] and William Scott, before he began his brilliant career as an advocate and a judge, had been for fifteen years a fellow and tutor of University College, Oxford, and for eleven years Camden reader of Ancient History.[7] In the second place, since all these advocates were obliged to study Roman law in order to get their degrees of doctor of law, it was chiefly by these advocates that the study of Roman law was maintained; and

[1] Preface v-xvii. [2] Above 47. [3] Vol. iv 235.
[4] Vol. v 7. [5] Below 647-661. [6] Below 646, 674.
[7] E. S. Roscoe, Lord Stowell 2-3.

they contributed the greater part of the small number of books on this subject which were produced by Englishmen.[1] But, in the third place, the exigencies of their practice compelled them to study also those parts of English law which were connected with their various spheres of practice. Therefore they were all compelled to know something of several systems of law; and this led some of the civilians in the eighteenth, as in the sixteenth and seventeenth centuries,[2] to pay some attention to jurisprudence and comparative law. It is true that some of the literature on Roman law and jurisprudence was produced by men who were barristers and English lawyers. We have seen that Wood[3] and Wooddeson[4] and Wynne,[5] who were barristers, made a considerable contribution to it; and we shall see that Blackstone was a student of Roman law and jurisprudence as well as of English law.[6] But these were all exceptional men, who, like St. Germain, Dodderidge, and Francis Bacon in the preceding period, had studied Roman law and other bodies of knowledge, legal and otherwise, besides English law.

In 1657 Robert Wiseman, dean of the Arches,[7] who was admitted an advocate of Doctors' Commons in 1663, and died in 1684, published a book, entitled *The Law of Laws*,[8] which lamented the decadence of the study of Roman law,[9] and gave reasons for thinking that it ought to be revived. His argument is that the Roman law is the most reasonable body of law in the world; that all nations had found it necessary to adopt its rules for the regulation both of municipal and international affairs; and that the common law had no rules sufficient to deal with such matters as the law of war and naval discipline, and diplomatic questions. It is a clearly written argument for the revival of the study of Roman law, from the point of view of jurisprudence and comparative law; but it is the book of an advocate, who can see no defect in his favourite system—he even defends the use made of torture in the Roman criminal procedure.[10]

Several books on Roman law were published during the eighteenth century for the use of students. In 1744 Robert Eden, archdeacon of Winchester, published, *in usum juventutis academiae*, a book on the elements of Roman law, arranged

[1] Above 83 n. 3. [2] Vol. v 16-17. [3] Above 425-427.
[4] Above 428-429. [5] Above 422-424. [6] Below 718.
[7] Coote, Lives of the English Civilians 86.
[8] The Law of Laws: or the Excellency of the Civil Law above all Humane Laws whatsoever. Showing how great Use and Necessity the Civil Law is to this Nation. There was a second edition in 1686.
[9] He said in his Preface: "The causes thereof are cantonized, and like a spoil divided; some carried to the courts of common law, some to the courts of equity, others sent into the country, some left without any rule or regulation at all, and nothing left entire to the Civil Law."
[10] Bk. i c. 8, pp. 122-132.

according to the order of Justinian's Institutes.[1] It gives the substance of the Institutes with explanatory notes, and references to parallel rules of English law. In 1756 George Harris, advocate of Doctors' Commons, published a text and translation of Justinian's Institutes, with an historical introduction, and with notes which were mainly concerned with a comparison between the rules of Roman and English law.[2] Of Wood's book on Roman Law I have already given some account.[3] In 1724 John Beaver published translations of Claude Joseph De Ferrière's history of Roman law,[4] and of Arthur Duck's book ;[5] and in the same year he published a translation of De Ferrière's history of the origins of French law. The last-named book he thought would be useful to students on account of the resemblances which could be found between the laws of the ancient Gauls and Franks and those of the Britons and Saxons.

By far the most learned of the works on Roman law is John Ayliffe's[6] *New Pandect of Roman Civil Law*,[7] which was published posthumously in 1734. The author tells us that he had been engaged on the study of Roman law for thirty years, and that he had intended to write a complete book on the subject. This, he says, was the first volume of the treatise. The rest was probably not written—certainly it was never published. But this volume in large folio covers a great deal of ground. It is prefaced by a lengthy preliminary discourse, in which, like Wiseman, he laments the decadence of the study of Roman law in England, and then goes on to give a history of Roman law in classical and modern times. When dealing with the history of the study of Roman law in England, he points out, truly enough, that the debt of English to Roman law is considerable. The treatise

[1] Jurisprudentia Philologica, sive Elementa Juris Civilis secundum methodum et seriem Institutionum Justiniani, in brevem et facilem ordinem redacta, Notis Classicis et Historicis, necnon Parallelis Juris Anglicani locis, illustrata. Quibus accessit Proemium De Jure Civili Romanorum ante-Justinianum et De Libris Juris Civilis Romanorum per Justinianum compositis.

[2] The Four Books of Justinian's Institutes, Translated into English with Notes ; the book is dedicated to Sir George Lee, below 666-669.

[3] Above 425-427.

[4] The History of the Roman or Civil Law. Showing its Origin and Progress ; how and when the several parts of it were first compil'd ; with some account of the Principal Writers and Commentators thereupon ; and of the method to be observed in studying the same.

[5] For this book see vol. v 24-25.

[6] For Ayliffe see above 610-611.

[7] A New Pandect of Roman Civil Law, as anciently established in that Empire, and now received and practised in most European Nations : With many useful Observations thereon ; shewing wherein that Law differs from the Municipal Laws of Great Britain, from the Canon Law in general, and from that Part of it now in use here with us in England. Whereunto is prefix'd by Way of Introduction, a Preliminary Discourse, touching the Rise and Progress of the Civil Law, from the most early Times of the Roman Empire : Wherein is also comprised a particular account of the Books themselves containing this Law, the Names of the Authors and Compiling of them, the several Editions, and the best Commentators thereon.

itself is divided into four books. The first deals in eleven titles with laws in general; the second in forty-four titles with persons; the third in thirty titles with things; and the fourth in thirty-seven titles with obligations contractual and delictual. The treatise is based primarily on the Code and Digest, to which full references are given; but the works of the modern civilians and classical authors are not neglected. There is for instance an account of the mediæval contract of cambium,[1] of usury, and of bills of exchange. Parallel rules of English law are referred to. For instance there is an account of the English statutes as to bankruptcy; and such English writers as Fitzherbert, Perkins, and St. Germain are cited in support of the author's references to English law. No other book of equal learning or comprehensiveness was published by an English writer in this century.

The books on jurisprudence and comparative law which were published in this century are generally based upon Roman law, or on the books of foreign writers whose juridical speculations revolved round the law of nature. Of some of these books—Wood's and Strahan's translations of Domat's book,[2] and Wooddeson's lectures on jurisprudence [3]—I have already given some account. All these books show that it was on the translations of books written by foreign writers that English lawyers relied mainly for information on these subjects. Of these foreign books the most widely read was Burlamaqui's *Principles of Natural and Politic Law*, which was translated into English in 1752.[4] Burlamaqui, who came of an Italian Protestant family which had taken refuge at Geneva, was successively the professor of civil and natural law at Geneva, and, like his father before him, councillor and secretary of state. His book is divided into two parts. The first part deals with natural law, and is subdivided into two parts—the first of which deals with the general principles of right, and the second with the law of nature. The second part deals with politic law, and is subdivided into four parts. The first part deals with the origin and nature of civil society and with sovereignty; the second with the different forms of government, the ways of acquiring or losing sovereignty, and the duties of sovereigns and subjects; the third contains a further examination of various points connected wth sovereignty, such as the legislative power, and powers in relation to religion, punishments, and property; the fourth is concerned with the main topics of international law—war, treaties, and ambassadors. The book is very well arranged and very clearly written. It sums up in a popular

[1] Vol. viii 126-128. [2] Above 427-428. [3] Above 428-429.

[4] The translator was Nugent; he published a translation of the part on Natural Law in 1748, and of both parts in 1752; there was a third edition in 1784.

and readable style current legal theories as to the function and rationale of natural and politic law. It states conflicting theories shortly, and comes to clear and sensible conclusions. What in our own day Holland's book on Jurisprudence did for the analytical school of jurisprudence founded by Austin, Burlamaqui did for the school of jurisprudence founded on natural law of which Pufendorf was one of the greatest exponents. He put Pufendorf's theories into a symmetrical and intelligible form; and what Sir F. Pollock has said of Holland's style can also be said of Burlamaqui's—it is "concise without abruptness, flowing without tediousness, and distinct without wearisome repetition." [1] It had a considerable influence on Blackstone, who uses and adapts many of Burlamaqui's theories both as to natural and political law; and it is the foundation of Woodeson's lectures on Jurisprudence.[2]

The only book written by an Englishman which can be compared with Burlamaqui's book is T. Rutherforth's *Institutes of Natural Law* [3] which was published in 1754. Rutherforth (1712-1771) was regius professor of divinity at Cambridge and archdeacon of Essex.[4] The book was based on a course of lectures given at St. John's College, Cambridge. Like Burlamaqui's book, it is divided into two parts, one of which deals with natural,[5] and the other with politic law;[6] but it often describes legal rules in more detail; and in the part dealing with natural law more use is made of illustrations taken from Old Testament history. It is also more diffuse—the author has not read and assimilated the continental legal literature as thoroughly as Burlamaqui had read and assimilated it; and his criticisms of Grotius are not always very illuminating. Thus he combats Grotius's view that there is a positive law of nations founded on usage; [7] but his reasons are not very convincing; and his theory as to the relation of the law of nature to international law is not very clearly expressed. Though the lectures are well arranged, and show considerable learning, though they were no doubt a good introduction to the study of political science and legal theory, they are inferior to Burlamaqui's book both in learning and in literary style.

Very few other books on jurisprudence or comparative law were written by Englishmen. The only three books that need

[1] Pollock, Essays in Jurisprudence and Ethics 9. [2] Above 428-429.

[3] Institutes of Natural Law. Being the substance of a Course of Lectures on Grotius de Jure Belli et Pacis.

[4] D.N.B.

[5] Vol. i: The Rights and Obligations of Mankind Considered as Individuals.

[6] Vol. ii: The Rights and Obligations of Mankind Considered as Members of Civil Societies.

[7] Vol. ii c. ix §§ 1 and 4.

be noticed are John Taylor's *Elements of the Civil Law*, Thomas Bever's *Discourse on the Study of Jurisprudence and the Civil Law*, and Fettiplace Bellers' projected book on *The Elements of Universal Law*.

John Taylor [1] was a fellow of St. John's College, Cambridge, and an advocate of Doctors' Commons, who abandoned the profession of the law for that of the church, and became archdeacon of Buckingham, and chancellor of the diocese of Lincoln. His editions of Lysias and Demosthenes show that he was a good classical scholar; and the breadth of his intellectual interests is shown by the fact that he was a vice-president of the Society of Antiquaries, and a member of the Royal Society. His book on the *Elements of the Civil Law*, which was first published in 1754, was intended to be an introduction to the study of Roman law and to the principles of law in general. It originated in notes made by the author for the instruction of the two grandsons of the Earl of Granville, to whom he had been appointed tutor. Taylor deals with certain select topics of Roman law—its history; the ideas of law and right, and public and private law; justice, equity, and the law of nature; the law of nations and the civil law; the sources of Roman law; the law of persons, marriage, the patria potestas, slavery, and property. The main outlines of all these topics are discussed and illustrated, not only from Justinian's books, but from the Greek and Latin classical authors, and from modern writers on Roman law, natural law, and international law. By this method of treatment the author succeeds in calling attention to the principles which underlie the topics which he is expounding. For students who had had a good classical education it was an excellent introduction to the study of Roman law and jurisprudence. That it was much read can be seen from the fact that it was reprinted in 1755, 1756, 1769, and 1772, and that it reached a fourth edition in 1828.

Thomas Bever's *Discourse*, which was published in 1766, is a much slighter affair. Bever (1725-1791) [2] was a fellow of All Souls and an advocate of Doctors' Commons. He was also judge of the Cinque Ports, and chancellor of the dioceses of Lincoln and Bangor. That he was a student of English law as well as of Roman law is shown by the fact that he attended Blackstone's Vinerian lectures. A copy of the notes which he took of these lectures is one of the copies of those lectures which have survived.[3] His *Discourse* is an introductory lecture to a course of lectures on jurisprudence and the civil law, which the author gave in 1762 for the regius professor of civil law.

[1] Coote, Lives of the English Civilians 117-118.
[2] D.N.B. [3] Below 720-721; App. IV (4) A.

In it he explains the usefulness of the study of jurisprudence, its connection with Roman law, and the advantages to be derived from both studies. The lecture is clearly written, but the subject-matter is thin and ordinary. The MS. of the course of lectures is in the library of All Souls College.[1] The lectures give a full account of the main topics of Roman law, jurisprudence, and international law taken from such authorities as Pufendorf, Domat, Burlamaqui, and the principal commentators on Roman law. There is an historical and ethical introduction; three parts devoted to private law, politic law, and public law; and an appendix, in which the history of the civil and canon laws and the feudal laws is related, and the constitutions of the European countries are described. They show few signs of originality, and they make very dull reading. They were not, Bentham tells us, very successful.[2] With the exception of an unfinished history of the Roman State and Roman Laws,[3] this introductory lecture was the only book which Bever published.

A very much more ambitious work was projected by Fettiplace Bellers (1687-1750?)—who was a dramatist as well as a writer on jurisprudence.[4] He proposed to write a treatise on *The Elements of Universal Law* in five books—(1) of law in general; (2) of private law; (3) of criminal law; (4) of the law of magistracy; and (5) of the law of nations.[5] His design was, he said,

> to deduce the elements of an entire body of laws from the highest principles of truth and knowledge: without dropping the inquiry so short as to leave practice wholly out of sight; nor yet carrying it down to those minute reasonings and circumstances which are necessary for the bar, the bench, or the senate.[6]

But though he spent twenty years over the work, all that he has left is a preface in which he explained his design, a table of contents, and an introduction, in which a short abstract is given of the contents of the five books, and of the various parts into which each book was to be divided. These documents were published either in 1740 or in 1750, after the author's death, at

[1] The author left his MSS. to John Loveday on the express condition that they were not to be published, and Loveday left them to All Souls College on the same condition, see vol. vi of the lectures, where a copy of the two bequests is inserted.

[2] "Blackstone was succeeded by Dr. Beaver, who read lectures on Roman law, which were laughed at, and failed in drawing such audiences as Blackstone drew," Works x 45; Bentham was mistaken in saying that Bever was Blackstone's successor; Bever lectured as deputy for the professor of Roman law; Blackstone's successor was Robert Chambers.

[3] The MS. of this work is in All Souls College library.

[4] D.N.B.

[5] A Delineation of Universal Law: Being an Abstract of an Essay towards deducing the Elements of Universal Law from the First Principles of Knowledge, and the Nature of Things; in a Methodical and Connected Series.

[6] Preface.

the request of "several tutors in the universities and persons eminent in the law." [1] That they were found of use to lecturers and students can be seen from the fact that a third edition was published in 1754.

Having given an account of the principal modern authorities used by the civilians in their practice, I must now say something of some of their most eminent members.

Some Eminent Civilians

We have seen that Dickens called the lawyers of Doctors' Commons a family party.[2] They were a family party, not only because they were a small group of men, connected by the ties of an education and a body of professional learning which differentiated them from the practitioners in the courts of law and equity, but also because many of them were the sons of fathers who had been civilians. Thus, Thomas Exton (1631-1688), who was King's advocate, judge of the court of Admiralty, and dean of the Arches, was the son of John Exton, who had been appointed judge of the court of Admiralty by the Parliament in 1649, and confirmed in that office after the Restoration.[3] Nathaniel Lloyd, who was King's advocate 1715-1727 and master of Trinity Hall, was the son of Richard Lloyd, who was dean of the Arches, 1684-1686, and judge of the court of Admiralty, 1685-1686.[4] John Bettesworth, dean of the Arches and judge of the prerogative court, had a less eminent son, John, who was a member of Doctors' Commons,[5] and the judge of the consistory court of London.[6] Two Pinfolds, father and son, were both advocates and both held small official positions.[7] Sir Henry Penrice was judge of the court of Admiralty for thirty-six years, and was succeeded in that office by his son-in-law Sir Thomas Salusbury.[8] But, though the advocates of Doctors' Commons were, in more senses than one, something of a family

[1] Advertisement to the book; the D.N.B. states that the book was published in 1750, and that there was a second edition in 1754 and a third in 1759; but the copy in All Souls College library is the third edition and it is dated 1754, which perhaps makes 1740 the more probable date of first publication.

[2] Above 50.

[3] Coote, Eminent Civilians 79, 86; D.N.B.

[4] Coote, op. cit. 87, 107.

[5] Ibid 109, 122.

[6] As judge of the consistory court, he was indirectly concerned in one of the *causes celebres* of the period. He decided, in the suit for jactitation of marriage brought by Miss Chudleigh against Mr. Hervey, that the marriage between her and Hervey was not proved; Miss Chudleigh then married the duke of Kingston; and it was this marriage which led to her indictment in 1776 for bigamy, in which the legal point at issue was the conclusiveness of Dr. Bettesworth's sentence, The Duchess of Kingston's Case (1776) 20 S.T. 355; for suits for jactitation of marriage see below 668 n. 3.

[7] Coote, op. cit. 108, 116.

[8] Ibid 108-109, 117.

party, several of them were distinguished men, who, as diplomatists, as servants of the Crown, and as members of Parliament, played some part in the government of the state; and as judges of the court of Admiralty and the ecclesiastical courts, played an important part in the development of maritime and ecclesiastical law. Of some of the more eminent of these men I must say something.

The most famous of the civilians of the latter part of the seventeenth century was Sir Leoline Jenkins.[1] He was, at different periods of his life, principal of Jesus College, Oxford, deputy professor of civil law, judge of the court of Admiralty, judge of the Prerogative court, ambassador, secretary of state, and member of Parliament—thus, in the number of the offices which he held, almost rivalling Elizabeth's more famous secretary of state, Sir Thomas Smith.[2]

Jenkins was born in 1623, and was perhaps a kinsman of the Welsh judge Jenkins, who wrote the *Eight Centuries of Reports*.[3] He was educated at Cowbridge School and Jesus College, Oxford; and, like his kinsman, he was a strong royalist. When Oxford surrendered in 1646, he retired to Glamorganshire. He and many other royalists, including Dr. Mansell, the principal of his college, found a refuge with Sir John Aubrey, who appointed him tutor to his son. In 1651 he and other royalists returned to Oxford, where he acted as tutor to the sons of several other royalists. But in 1655 he and his pupils were forced to retire abroad by the authorities. He spent three years in France, Holland, and Germany. From 1658-1660 he was given a home and protection at Apley in Shropshire by Sir William Whitmore. In 1660 he returned to Oxford. On the resignation of Mansell he was made principal of his college; and he at once set himself to work to restore its discipline and its finances. He continued to hold the office of principal till he was appointed ambassador at Cologne in 1673; and at his death he left to it the greater part of his fortune.

When he returned to Oxford he made the civil and canon law his special study. His friend, archbishop Sheldon, made him

[1] The principal authority for his life is W. Wynne's Life, prefixed to the series of letters written during Jenkins's embassies to Cologne and Nimeguen and to a series of letters and other papers written by Jenkins; other unpublished papers written by Jenkins are in the library of All Souls College, Oxford. W. Wynne (1693-1765) was the son of Owen Wynne, Jenkins's secretary, to whom Jenkins left his MSS., and a fellow of All Souls; see also two papers by D. J. Llewellyn Davies, The Development of Prize Law under Sir Leoline Jenkins, Transactions of the Grotius Soc. xxi 149-160, and Enemy Property and Ultimate Destination 1664-1667 and 1672-1674, British Year Book of International Law 1934, 21-35.

[2] Vol. iv 209-210.

[3] Wynne i *i*; see a letter from the Welsh judge to Wilkins, warden of Wadham, recommending Jenkins, written in 1651, Wynne ii 643; for Judge Jenkins and his reports see vol. v 354, 362.

diocesan commisary, the university appointed him assessor of the Chancellor's court, and Dr. Sweit, the regius professor of civil law and dean of the Arches, made him his deputy. He lectured on the title *De Judiciis et Processu Judiciariis*—explaining the jurisdiction of the courts in which the civil law was applied, and the constitution and jurisdiction of the courts of the University. While he remained in the University he was regarded as "a sort of oracle in all questions and matters of law." [1]

While he was at Oxford he had helped Sheldon to found his theatre and the University printing house; [2] and it was to Sheldon that his further advancement was due. Sheldon encouraged him to come to London, and to get admitted as an advocate at Doctors' Commons. He was admitted in 1664; and, in later years, he was instrumental in protecting that body from the fiscal exactions of the court of aldermen, and in getting its members exempted from the obligation to serve as ward or parish officers.[3] He was at once made deputy to Dr. Sweit, the dean of the Arches; and, in the following year, on the outbreak of the Dutch war, he was made a member of the commission to exercise Prize jurisdiction. At the request of the commissioners he and other civilians reviewed the maritime law, and compiled a body of rules for the exercise of the Prize jurisdiction.[4] In the same year he was made assistant to Exton, the judge of the court of Admiralty, and, on Exton's death in 1668, he became the sole judge of the court. He continued to be judge of the court till his death in 1685. In 1668 Sheldon appointed him the judge of his Prerogative court, with the full approbation of the King.[5] We shall see that as judge of the court of Admiralty he left

[1] Wynne i *x*; see ibid. ii 652—a letter as to the jurisdiction of the steward of the University to try cases of felony, cp. vol. i 173; see also Wynne ii 653-654, 657—letters as to the privileges of the town and the university.

[2] "He not only framed the draught of that grant with his own hand, which I have seen with Archbishop Sheldon's strictures on it, but also the statute *de vesperiis et comitiis a B. Virginis Mariae templo transferendis ad theatrum*, that the House of God might be kept free for its own proper and pious uses," Wynne i *xi*; the cellars of the Sheldonian were used for the university press till the Clarendon building was built for it in 1713, see C. E. Mallet, History of the University of Oxford ii 427; that Jenkins and Fell took a large part in the foundation of the university press is shown by the letters to Jenkins on this subject in S.P. Dom 1671, 1671-1672, 1672-1673; and see also S.P. Dom. 1679, 369-370.

[3] Wynne i *liii*.

[4] For these rules see Marsden, Law and Custom of the Sea (Navy Records Soc.) ii 53-57.

[5] "The King himself was pleased to recommend Dr. Jenkins to the Archbishop . . ., saying, that as he had accepted his (the Archbishop's) recommendation for the court of Admiralty, he expected that the Archbishop should take his nomination to the Prerogative Court: but the Archbishop with his usual gallantry told his Majesty, he was sorry he had prevented his gracious intention, yet would not despair of his pardon, since he had before conferr'd it upon the very same person his Majesty had thought most worthy of it," Wynne i *xvii*.

his mark upon the Prize and instance jurisdiction of his court,[1] and that as judge of the Prerogative court he left his mark upon the law as to grants of probate and administration, and as to the law of intestate succession to chattels.[2]

In 1669 the King sent him to Paris on the first of his diplomatic missions. The occasion for the mission was a dispute as to the succession to the estate of Henrietta Maria, the queen-mother. He succeeded in vindicating the King's right to administer the estate of his mother, and, on his return, was knighted.[3] In 1669 there was a project of a union between England and Scotland, and Jenkins was appointed one of the commissioners to treat with the Scotch commissioners; but the project fell through. It would seem from Jenkins's letter to the Duke of York that he did not favour it.[4] In 1671 he was elected a member of Parliament for Hythe.

In 1672 the second Dutch war broke out. Jenkins could not and did not defend the manner in which the war was begun by the attack on the Smyrna fleet.[5] In 1673 Jenkins and Williamson were appointed ambassadors to negotiate a peace at a congress of the Powers to be held at Cologne. The congress effected nothing; but a separate treaty was made between England and Holland, which provided *inter alia* for the salute to the British flag as an acknowledgment of the claim of the Crown to dominion over the British seas.[6] Jenkins returned home in 1674. The following year he was sent to Nimeguen to negotiate for a general peace. His colleagues were Lord Berkley, the British ambassador at Paris, and Sir William Temple. Eventually treaties of peace were made between France and Holland, and France and the Empire. The King was pleased with Jenkins's share in these intricate negotiations,[7] and in 1679 appointed him ambassador-extraordinary at the Hague. But, at the request of the Prince of Orange and the northern Powers, he was allowed by the King to return to Nimeguen and negotiate a peace between those Powers. The treaty was signed, and he returned in August 1679. Temple and Jenkins were very opposite characters; and both Temple and Williamson were critical of Jenkins's conduct as a diplomat. Temple was perhaps jealous of a colleague whose

[1] Below 653-658. [2] Below 658.

[3] For the documents relating to this mission see Wynne ii 663-672.

[4] Ibid 675-686; he concludes, p. 680, that all that is really needed is to make provision for complete freedom of trade between the two countries—"the union being, as it now stands, in the eye of the law of nature and nations, as perfect, strong, and indissoluble, as any union whatsoever now in Christendom."

[5] Ibid i *xxi*.

[6] Ibid *xxii*; this claim was regarded as a matter of the greatest importance, see Law and Custom of the Sea ii 86-87, 165-168; it raised the difficult question of what were the British seas, below 669, 671.

[7] Wynne i *xxviii*.

temperament was so different from his own ;[1] and Williamson, having had differences with Jenkins at Cologne, was always anxious to find fault with all he did—often very unjustly.[2] It is well to remember that Jenkins had a thorough knowledge of diplomatic usage ; and that his cautious conduct and eventual success won the approbation of Charles II, who was a better judge than any of his ministers of the conduct of such negotiations.

In the Parliaments of 1679-1680, and 1680-1681 Jenkins sat as member for the University of Oxford. He was a strong supporter of the court, and therefore an opponent of the exclusion bill.[3] On May 5, 1680, he was made secretary of state,[4] and held that office till 1684, when failing health compelled him to retire. Naturally he continued to be a strong supporter of the monarchy and the Church of England. In 1681 he appeared as a witness on the indictment of Shaftesbury, to prove that amongst his papers was a scheme, to be agreed on by Parliament, for legislation against papists and a popish successor. The grand jury of the City of London met the indictment with an Ignoramus, and it was necessary to protect the Crown witnesses against the fury of the mob.[5] But though, like North and Nottingham, he was an upholder of a constitution in which the King was the predominant partner,[6] he was no advocate for an absolute monarchy. In a memorandum which he wrote at this period he said : "There is no governing without laws ; and true liberty consists in conformity to rational laws." He thought that the King could easily prevent projects to set up a commonwealth,

1. By standing firm and resolute to the fundamental laws. 2. By making no more concessions than may satisfie moderate and ingenuous men, or rather, than conscience and justice will require. And above all, 3. By promoting true religion, in the decency of worship, sobriety of doctrine, and beauty of holiness.

The Duke of York, he thought, ought to become a Protestant ; and Parliament, he said, could "prevent war by doing no injustice."[7] Like North he was in favour of moderate measures, and was opposed to "altering or transgressing those bounds the law had fixed, between the just prerogatives of the Crown and the legal rights of the subject" ;[8] and he was not in favour of

[1] Wynne i *xxix*.

[2] Ibid *xxx-xxxii* ; Burnet's censures, as Wynne shows, had no foundation, ibid *xxxii-xxxiii* ; Burnet, being a Whig, naturally disliked so high a Tory as Jenkins.

[3] Below 651. [4] S.P. Dom. 1679-1680, 464.

[5] Luttrell's Diary i 146 ; in 1682 Jenkins was presented by one grand jury for committing a person to prison, and by another for disturbing a conventicle ; but a *nolle prosequi* was entered, and the informer, one Edward Whitaker, was committed to the Tower, S.P. Dom. 1682, 82, 104, 189.

[6] Vol. vi 531-532, 533-535, 539-540.

[7] Wynne i *xlvi*. [8] Ibid *xlviii*.

the *quo warranto* proceedings against the City of London.[1] Though Roger North, in one passage of his *Lives*, depreciates his abilities as secretary,[2] he is obliged to admit that his brother, when Jenkins retired, often said "that he was absolutely alone in the court; that no one person was left in it with whom he could safely confer in the affairs of the public"; [3] and that, after his retirement, "it was notorious that the King's affairs went backwards; wheels within wheels took place; the ministers turned formalizers and the court mysterious." [4]

In April, 1684, Jenkins, to the great regret of the King,[5] resigned his office. Though he was again sworn of the Privy Council, and elected as member for the university on the accession of James II in 1685, he never recovered his strength, and died in the September of that year.

Jenkins left his mark upon many different branches of English law.

His views upon constitutional law are, to some extent, what might be expected from a churchman and a royalist.[6] In the debate on the exclusion bill he adopted the high church view of those who held that the King was King by divine right, and therefore denied that Parliament could alter the succession to the throne so long as there was a person in existence who had a hereditary right to it.[7] We have seen, too, that he thought that the Crown could by his prerogative prevent his subjects from leaving the kingdom, and command them to return.[8] He stated the principle, which was then, and still is, the principle accepted by English law,[9] that a subject cannot break the bond of allegiance merely by living in a foreign country.[10] On the other hand, we have seen that, like North, he was by no means in favour of an absolute monarchy; that he believed in the supremacy of the law; that, on political questions, his counsels were in favour of moderation; [11] and that, as judge of the Prize court, he objected to orders which he considered to be contrary to the

[1] Wynne i *xlvii*.

[2] "Sir Leoline Jenkins was the most faithful drudge of a secretary that ever the court had," Lives of the Norths (Bohn's ed.) i 301.

[3] Ibid 305. [4] Ibid 306. [5] Wynne i *xlix*.

[6] Comparing the supporters of the Church of England with the dissenters and the papists, he said: "I am sure they have deserved much, and have suffer'd much, they are the only people whose pretensions are founded on the law, and whose principles and forms of government strengthen and support monarchy," ibid *xlv*.

[7] In one of his speeches on the exclusion Bill he said: "It is not in our power to put down Monarchy, as long as there is any person that has right to the Crown; because the succession of this Monarchy is as essential to this government as Monarchy itself. We may with the same authority change the government into a commonwealth as pretend to alter the succession. And therefore, for my part, I think, if such an Act should pass, it would be void, and of no force nor obligation at all," ibid *cii-ciii*.

[8] Ibid ii 712; vol. x 391 n. 9. [9] Vol. ix 86-87, 90-91.

[10] Wynne ii 712-713. [11] Above 650.

rules of international law.[1] He laid it down that "there is no such thing as a slave in England"[2] at a time when this principle was by no means established, and had in fact been denied by some of the common law judges.[3] He stated, more clearly than Blackstone, that the Roman rule, that property taken from the enemy can be acquired by *occupatio*, is no longer law.[4] "The present practice of the most civil and puissant soveraignties of the world," he said, "hath superseded this law; and the title to enemies' goods is vested in the Prince, and from him derived as other Regalia are, and sometimes . . . annexed to inferior jurisdictions."[5] But, as this last illustration shows, it is upon the various branches of law which fall within the sphere of the civilians' practice, rather than upon general questions of constitutional law, that his authority is highest. His rulings upon many of the questions arising in the different parts of that practice have helped forward the development of these branches of law.

Jenkins was a master of all the branches of law which fell within the sphere of the civilians' practice—Roman law, international law, Prize law, maritime law, and ecclesiastical law. He had reflected upon and had administered all these branches of law. And so he was not only the ablest expositor in his day of their rules and of the principles underlying them, but also their ablest critic. His criticism was embodied in legislative proposals, some of which have been carried into effect in the eighteenth and nineteenth centuries. Let us look at Jenkins's work from these two points of view—first as an expositor of the law, and secondly as its critic.

(1) *Jenkins as an expositor of the law.*

Like Wiseman and other civilians,[6] Jenkins stressed the importance of encouraging the study of Roman law. In his argument on behalf of a bill to establish the jurisdiction of the Admiralty, he said:

> I hope it will not be thought invidious, if I choose the words of a great and wise Prince, his Majesty's royal grandfather. I do greatly esteem (says he) the Civil Law; the profession thereof serving more for general learning, and being most necessary for matters of treaty with foreign nations. And I think that if it should be taken away, it would make an entry to barbarism, and blemish the honour of this kingdom. For it is in a manner *Lex Gentium*, and maintaineth intercourse with all foreign nations.[7]

[1] Vol. i 566; cp. Transactions of the Grotius Soc. xxi 152; below 653, 670.
[2] Wynne i *xciii*—a charge given at an Admiralty Sessions at the Old Bailey.
[3] Vol. iii 507-508; vol. xi 247 *n.* 1.
[4] Comm. ii 401; vol. vii 481-484.
[5] Wynne ii 765.
[6] Above 640.
[7] Wynne i *lxxxiv*; Jenkins was quoting James I's speech to Parliament in 1609, Works (ed. 1616) 532, vol. iv 233 n 5; and both the Protector Somerset and Francis Bacon had been of the same opinion, ibid 233.

As a diplomat and as a judge of the Prize court Jenkins was obliged to study and apply international law. Like Gentili and Zouche and Bynkershoek, he belonged to the historical or positivist school of international lawyers.[1] In the course of an argument addressed to the King, directed to prove the proposition that one parcel of enemy goods on a ship was not a sufficient ground to condemn the ship, he said,

> the reason I conceive to be, that it is not agreeable to the law of nations—by the law of nations I do not mean the Civil Imperial Law, but the generally received customs among the European governments which are most renowned for their justice, valour, and civility.[2]

This law of nations, he held, could not be infringed except by the express provisions of a treaty or statute. Advising the Crown as to the conditions in which letters of marque and reprisal could be issued, he said :[3]

> I do not deny, but that soveraign princes in their treaties may so alter and abridge the solemnities of law now observed all over Europe in this case ; . . . but, as it is a certain rule in law, that no statute or constitution shall be interpreted to restrain and derogate from an ancient law and customs universally received, further than the words of such statute are express and decisive : so it is in treaties, they are not to be understood as altering or restraining the practice generally received, unless the words do fully and necessarily infer an alteration or restriction.

In 1680 he advised the King that the condemnation of a Dutch ship in the Irish court of Admiralty, at the suit of a captor who was a French privateer, was a gross breach of neutrality, and contrary to the treaty of 1667.[4] We have seen that as judge of the Prize court he disapproved of orders which seemed to him to be contrary to the principles of international law, though he held that the court was bound by such orders.[5] This was the view upheld by Lord Stowell,[6] but it is contrary to the most recent decision of the Privy Council, which overrules the law as laid down in the late seventeenth, the eighteenth, and the early

[1] Vol. v 54, 59 ; above 631, 634.
[2] Jenkins MSS. (All Souls Library) no. 216.
[3] Wynne ii 759.
[4] Ibid 733-734.
[5] Vol. i 566 ; above 651-652 ; Jenkins was of opinion that the interpretation of treaties was a matter for the Privy Council, and that the Prize court must accept that interpretation, Wynne ii 732-733, though he sometimes gave advice as to their interpretation, ibid 733-734, S.P. Dom. 1668-1669 36 ; similarly, although the question of what goods were contraband and what not was to be decided partly by treaties and partly by the law of nations, below 671, Law and Custom of the Sea ii 57-58, 290-291, Penrice, the judge of the Admiralty, in 1745 asked the lords of the Admiralty for a ruling as to whether pitch and tar in Swedish ships were contraband, and, like Jenkins, he considered the interpretation of treaties to be a matter of state, ibid ii 318-320 ; on the other hand, Sir James Marriott, in an opinion which he gave in 1764, stressed the independence of the Prize court, Calendar of Home Office Papers 1760-1765, 454, 455 ; below 675-676 ; see E. S. Roscoe, History of the Prize Court 40-44.
[6] Vol. i 567 n. 4.

nineteenth centuries.[1] Moreover, his skill as a diplomat and as a judge of the Prize court brought before him questions which nowadays fall under the rubric Private International Law. He was employed by the King to negotiate with the French as to the King's right to succeed to his mother's estate,[2] and as to the Duke of York's right to succeed to the seigniory of Aubaine.[3] He advised the King that in time of war a man cannot have two domiciles, "whereby he shall be made subject by each of them to war or reprisals at one and the same time."[4] Commercial domicile was, he said, the decisive factor in these cases.[5] He also advised that according to the rules of international law foreign judgments, on matters within the foreign court's jurisdiction, must be respected; and therefore that the judgment of a Prize court, vesting the property in a ship in the captors, was conclusive, and effect must be given to it by an English court.[6]

As judge of the Prize court he laid down some very fundamental principles governing the exercise of the Prize jurisdiction. He insisted upon the duty of a neutral state to treat belligerents impartially;[7] and the necessity of doing justice to neutrals, who, he pointed out, had a right to trade with the enemy unless they attempted to break a blockade or to carry contraband.[8] He told the secretary of state that the claims of neutrals must be heard; that if neutral goods were shipped on Dutch ships before the neutrals had notice of the outbreak of war, they ought to be restored; and that if this justice were refused it would be a just cause of reprisals.[9] In 1668 he explained that, by the *jus commune*, a friend's ship could not be confiscated because it carried enemy goods; but that an enemy ship

[1] The Zamora [1916] 2 A.C. 77; see vol. i 567-568.

[2] Wynne ii 667-670—his argument was that the Queen was domiciled in England, and had never changed her domicile, though she died in France.

[3] Ibid 704—the difficulty was that the Duke was not a naturalized Frenchman.

[4] Ibid 785.

[5] "If the war in 1672 had happened to have been against Sweden, and not against Holland, and this privateer had taken this master, his being a sworn burgher at Calmar, and his paying scot and lot there, would, as I take it, have made him good prize, and that justly too; his being a Hollander born, his having a house at Amsterdam, and his passing a winter there (tho' never so well prov'd) would not have sav'd him," ibid; for commercial domicile see vol. ix 99-102.

[6] Wynne ii 761-763; he said, at p. 762, "'Tis a ruled case, that one judge must not refuse, upon letters of request, to execute the letters of another foreign judge, when the persons or goods sentenced are within his jurisdiction; and if he do, his superior must compel him to it; else it is a sufficient ground for reprisals against the territory: but it being debated in the Imperial Chamber of Spire, whether a judge in this case might not judge of nullities, or other objections, against a sentence so recommended to his execution, it was resolved he might, and suspend execution if he saw cause; but he might not pronounce on these nullities, or anything else that impugned the sentence upon the merits of the principal cause"; for the development of the English law on this subject see vol. xi 270-273.

[7] Transactions of the Grotius Soc. xxi 154.

[8] Ibid 155.

[9] Wynne ii 702.

made enemy goods.[1] He was fully conscious of the difficulty of dealing with the misdeeds of privateers; but he insisted that a privateer, even though he had exceeded his commission, was not a pirate, so that the courts of the state who had commissioned him should adjudicate upon his conduct;[2] and that, if a privateer was guilty of illegal acts which damaged a third person, it was the privateer, and not the state who commissioned him, who was liable.[3] In 1667 he ruled that, if a neutral had carried enemy's goods to their destination, and had received the freight, neither the freight nor goods bought with it could be seized.[4] On two occasions he advised the Crown on the thorny subject of what captures were droits of the Crown and what were droits of the Admiralty.[5] In 1674 he advised that, apart from treaties, no goods could be held to be contraband, unless they were "directly and immediately subservient to the uses of war, except it be in the case of besieged places."[6] In 1675 he laid down the principle that no subject could take contraband goods from another subject unless the transportation of such goods was prohibited by law;

> for the taking and confiscating of contraband goods is either a right of the law of nations, or else a concession by treaty, which your Majesty's allies may challenge when they are in war, and find such goods transported by your Majesty's subjects: And nothing but a law prohibiting the exportation of such or such goods, can give a right to one fellow subject to confiscate the goods of another, and then that right is expressed and limited by that law.[7]

In the same opinion he laid it down that the Crown could give a permission to trade with the enemy, and so make such trade lawful.[8] He laid it down that if the facts did not amount to proof, yet, if they raised a violent presumption against the claimant, they must be "reputed proofs against him until he do take them off"; for, where the claimants were acting fraudulently, there could only be presumptions, since

> as 'tis certain the Dutch do still carry on a main trade under these disguises, so 'tis not to be expected, that they should lay their scenes with such colors, as shall at first view betray their design.[9]

[1] "The treaty with the States mentions not this case; therefore it must be resolved according to the *jus commune*, which allows not the confiscating of a friend's ship because it carries enemies' goods. 'Tis true, that an unfree ship makes the goods of a friend unfree, but besides that it is obvious that there is not a parity of reason in both cases, penal constitutions cannot be extended beyond the letter, to the prejudice of publick commerce," Wynne ii 719.

[2] Ibid 714. [3] Ibid 749. [4] Ibid 741.

[5] Ibid 741-743, 765-767; for the history of the Admiralty droits see vol. i 559-561.

[6] Ibid 751. [7] Ibid 781. [8] Ibid 782.

[9] Ibid 701; see Year Book of International Law 1934, 24-29; as Mr. Llewellyn Davies points out, the principles laid down by Jenkins are essentially the same as those laid down by Sir Samuel Evans in The Kim [1915] P. 215; moreover one of his reports suggests "that even the Black List was not a new invention of the great war," Year Book of International Law 1934, 29.

Moreover, the stress laid by Jenkins on the ultimate destination of the ship, and the proofs which he demanded that that destination was genuinely neutral, foreshadow the doctrine of continuous voyage.[1] In addition to laying down some basic principles of Prize law, Jenkins sometimes gave sound advice as to the policy of rules laid down by Crown for the exercise of the Prize jurisdiction. Thus in 1664 the Crown had ordered that a neutral ship, which carried subjects of the enemy state, e.g. a French ship with Dutchmen on board, was liable to forfeiture. Jenkins pointed out that this order was not politic for two reasons: first, because no neutral ship dared to employ a Dutch seaman, so that the wages of seamen on neutral ships, and therefore the freights charged, rose; and, secondly, because the supply of Dutch seamen available to man the Dutch fleet was thereby increased.[2]

The fact that the civil jurisdiction of the court of Admiralty was crippled by writs of prohibition, prevented that court from doing much for the development of maritime law. But Jenkins did what he could for this branch of the law and for his court. In 1680 he gave an opinion that the master had no power to sell part of the cargo;[3] he protested against the injustice of not allowing material men to sue in the Admiralty, and thereby depriving them of a remedy against the ship;[4] and he gave an opinion to the Lord Chancellor as to the rights of the majority of the part-owners of a ship to deal with the ship, and the inability of a part owner, who had not shared the expense of fitting out the ship for a voyage, to share in the profits of the voyage.[5] In 1677 he pointed out to Pepys the importance of the office of registrar of the court, and the inexpediency of giving the office to a person who had no qualifications, and could only execute it by deputy.[6] We have seen that his learned and conclusive argument in favour of a bill to settle the jurisdiction of the Admiralty, and to give it a larger jurisdiction in maritime causes, failed to convince the House of Lords.[7] But it should be noted that one of the arguments which he advanced for the

[1] Year Book of International Law 1934, 29-33.

[2] Wynne ii 740; this advice was followed in 1666, and the forfeiture of the ship was remitted where the master had taken three Dutchmen on board without the owner's knowledge, S.P. Dom. 1665-1666, 356; and also in 1672—Lauderdale wrote to the Scotch judges, "it was deliberately thought fit in the Councell of England that any number of the Dutch nation being found on board should not confiscate ship and goods, as it did during the last war."

[3] Wynne ii 717.

[4] Ibid 746—"If they be put to their personal action against the master only, who employ'd them at work, or took up their goods, they find him commonly not worth of his own the 40th part of what he may, and in some cases must, take up upon the credit of his ship."

[5] Ibid 792.

[6] Ibid 709-710.

[7] Ibid i *lxxvi-lxxxv*; vol. i 555, 557.

bill is almost prophetic, in that it explains the reason why the development of commercial law in England was slow. If, he said, the bill passed, foreigners would understand the reasons for the decisions of the court, and foreign civilians could advise them whether to acquiesce in the decision or to appeal from it; "whereas now, all foreigners do complain extremely, that they can have no other account of their cause, but that the *foreman of the jury said*, they found against him." [1] We have seen that, till Lord Mansfield's time, this was the reason why, as Buller, J., said, the cases "produced no established principle." [2] There is no doubt that at this period, and long after, common law judges and juries were quite incompetent to try these causes. Pepys's caustic remarks on this subject [3] can be supplemented by a tale, which appears in the Jenkins MSS., of a maritime case which had been heard at the Exeter assizes.[4] The ship being bound for the port of Barbadoes had overshot the port:

> The judge asked what the witness meant by overshott, and the witness telling him they had missed and were gone beyond their port, the judge asked why, when they see they were gone beyond their port, they did not turn back and goe to it; and, the witness telling the judge that there was a trade wind and they could not, he demanded whether they did not all goe a trading; and then that witness telling him that they did endeavour to beat it up with their ship, he asked whether their shipp would goe the better for beating.

Jenkins did not neglect the criminal business of the court of Admiralty. The sessions of the Admiralty for criminal business, he said, were "of great concern and support to the old English discipline at sea, and consequently to the good of our navigation and commerce." [5] His charge at an Admiralty session at the Cinque Ports in 1668,[6] and another at a session at the Old Bailey,[7] explained to the jury the nature of the various offences which came within the sphere of the Admiralty jurisdiction. Many of these offences were also offences at common law, but, in addition, there were offences against "the ancient laws and usages of the sea and contrary to the particular constitutions and ordinances of the Admiralty of England," [8] such as offences relating to the flag, negligences of pilots, or breaches of discipline. But the common law courts restricted the criminal, as they restricted the civil, jurisdiction of the court. Thus they

[1] Wynne i *lxxxiv*. [2] Above 282.
[3] Diary (ed. Wheatley) iii 364, cited vol. v 154.
[4] Jenkins MSS. (All Souls Library) vol. 239 f. 330.
[5] Wynne i *xv*. [6] Ibid *lxxxv-xc*. [7] Ibid *xc-xcix*.
[8] Ibid *xcii*; in S.P. Dom. 1672-1673, 605, a commission to try spies is recorded, which was issued to the judge of the Admiralty and others, and in it the judges are authorized to use torture; this was clearly illegal, since the older criminal procedure which was founded on Roman law and allowed torture had been abolished in 1536, 28 Henry VIII c. 15, vol. i 550-551.

held that persons who had been caught exporting wool contrary to statutes of 1660, 1661, and 1662, though they were arrested below bridges, could not be tried by the court of Admiralty.[1]

Some of Jenkins's opinions upon points falling within the jurisdiction of the ecclesiastical courts, show that he was as learned in ecclesiastical law as in maritime or Prize law. He, together with Sweit, the dean of the Arches, advised Lord Keeper Bridgman as to the law relating to decrees of divorce *a mensa et thoro*, the conditions in which these decrees could be rescinded, and the obligation of the husband to pay alimony.[2] They also advised him that an extraordinary commission to dissolve a marriage, into which a man had been inveigled while drunk, ought not to be granted, because the ordinary remedies and the ordinary courts were available.[3] He reported to the King on a grant of administration made by the ecclesiastical court of the bishop of Lichfield, and advised an appeal to the prerogative court.[4] He advised the Portuguese ambassador as to a claim against the estate of a deceased ambassador made by an employé.[5] It is interesting to note that he states the ecclesiastical law to be, first, that debts due for servants' wages were preferred over other debts not due by specialty or writing;[6] and, secondly, that there was no presumption that a legacy left to a creditor was a satisfaction of the debt.[7]

(2) *Jenkins as a critic of the law.*

We have seen that Jenkins helped Nottingham and North to draft the statute of Frauds.[8] He drafted the clauses which laid down the rules as to the conditions in which nuncupative wills of personalty were valid, as to their probate, as to the revocation of written wills of personalty, as to soldiers' and sailors' wills, and as to the jurisdiction of the ecclesiastical courts.[9] Though he did not draft the statute of Distribution,[10] he approved of its policy, and he has left a paper in which he states the reasons why it ought to be passed.[11] He attempted without success to reform the High Court of Delegates. We have seen that the chief defect of that court was the fact that it was composed of a body of poorly paid persons appointed *pro hac vice*.[12] Jenkins proposed, and Doctors' Commons approved his suggestion, that a permanent commission, properly paid, should be appointed; and he prepared a draft set of rules for the procedure of the

[1] Wynne ii 747-748; for Jenkins's argument to the contrary see ibid 745-747.
[2] Ibid 723. [3] Ibid 723-724. [4] Ibid 737-738.
[5] Ibid 757. [6] Ibid.
[7] Ibid; for the doctrine of the court of Chancery on this question see above 225, 269.
[8] Vol. vi 382, 384. [9] 29 Charles II c. 3 §§ 19-24; vol. vi. 385.
[10] Vol. iii 559-560. [11] Wynne ii 695-697. [12] Vol. i 605.

court.[1] He prepared a bill to prevent clandestine marriages [2]—thus anticipating Lord Hardwicke's proposals ; [3] and also bills to revive the authority of rural deans, and to get rid of peculiars.[4] Like Francis Bacon, he objected to the use of excommunication as part of the ordinary process of the ecclesiastical courts ; and he revived a suggestion made in 1584 that, for the writ *de excommunicato capiendo*, a writ *de contumace capiendo* should be substituted.[5] We have seen that it was not till 1813 that effect was given to this suggestion.[6] We have seen that he advocated a bill to settle the jurisdiction of the court of Admiralty, the effect of which would have been to give the court a much larger control over the development of maritime and commercial law.[7]

At a period when the standard of personal and public morality was low, Jenkins, like Hale,[8] set an example to his contemporaries ; and the respect which the King and very many of his subjects felt for his lofty standards of conduct gave him, as they gave Hale, an influence which ability alone could never have secured. He was a conscientious man whose only pleasure was in doing what he conceived to be his duty ; [9] and his extreme conscientiousness led him to refuse the customary presents made by foreign sovereigns, and even by his own sovereign, to ambassadors.[10] He was a genuinely religious man,[11] "a constant attendant some part of every day upon the publick offices of the church even amidst the most important business of his life" ; [12] and so convinced of the truth of the Anglican creed that he made an attempt to shake the faith of the Duke of York.[13] He was diffident—sometimes too diffident—of his own abilities,[14] apt to under-value his own services, but always grateful to those who had served him.[15] As a judge he impressed

[1] Wynne i *lii ;* Coote, English Civilians 87.
[2] Wynne i *lii*. [3] Vol. xi 609-610 ; above 249.
[4] Wynne i *lii ;* but, says Wynne, the project to get rid of peculiars "he soon laid aside, for fear the abolition of those little jurisdictions, like that of the smaller religious houses in Hen. VIII time, might usher in the downfall of the greater" ; for peculiars see vol. i 600.
[5] Wynne i *lii-liii ;* vol. i 631-632. [6] Ibid 632.
[7] Above 656-657. [8] Vol. vi 576-580.
[9] "He was a man of little leisure, and no sort of pleasure, even to a voluntary abstinence from innocent and agreeable diversions ; and in many things of life exceeded the most rigid Stoick," Wynne i *liv*.
[10] Ibid *xxxvi-xxxviii, liv ;* when secretary of state he refused a present of wine from the mayor of Bristol, S.P. Dom. 1683, 88.
[11] Wynne i *lxiii* tells the following tale : When he and Temple were at the Hague, Temple asked leave to receive the communion the next day in the chapel ; "accordingly her Highness was pleased to give orders to her chaplains to make everything ready : for tho' I am perswaded (says she) he does not intend it, and by the morrow will bethink himself of some business or excuse ; yet my lord ambassador Jenkins, I doubt not, will be there, tho' he has not sent so formally to me."
[12] Ibid *lix-lx*. [13] Ibid *lxii-lxiii ;* cp. ibid ii 689-691.
[14] Ibid i *lv*. [15] Ibid *lvi*.

his contemporaries.[1] On the bench he was affable and courteous. "He would often by a soft persuasive word dropt from him in the opening or breaking of a cause, put an end to suits in an amicable accord of the parties . . . which . . . by their expence might have undone the parties without his interposition."[2] To poor suitors, and especially to poor seamen, "he was so tender and pitiful, that he often remitted his just and most legal fees."[3] He encouraged them to apply to him, he saw to it that they were not imposed on by the officials of his court, and he sometimes persuaded those officials to abate their fees.[4] But he always kept a firm control over the conduct of the business of his court, and over those who practised before him, as Dr. Walker once found. Walker had "given indecent language to Dr. Milles in court and to Dr. Jenkins himself for reprimanding him." Upon which Jenkins entered a monition among the Acts of the court, requiring Walker "to conform himself in his language and behaviour to the respect and decorum which the constitution of this court and common civility required, *sub pœna juris et contemptus*," and threatening to suspend him if he offended again.[5] Though he was no courtier, he, like Hale, won the respect of Charles II;[6] for Charles was an acute judge of character, and could respect the qualities in others which he lacked himself.

It is, I think, clear that Jenkins was easily the greatest of the civilians of his day. We shall now see that none of his successors in the eighteenth century had the same combination of qualities. It was not till Sir William Scott was made judge of the court of Admiralty in 1798, that that court got a judge who

[1] Pepys was interested in a prize case and went to the trial; he said, Diary, March 26, 1667, "I am mightily pleased with the judge who seems a very rational, learned, and uncorrupt man"; Sir Ellis Leighton, the Crown counsel, told Pepys, Diary, March 27, 1667, that he was appointed "against the gré and content of the old Doctors," but that he was "a very excellent man both for judgment and temper, yet majesty enough, and by all men's report not to be corrupted"; Ellis Leighton was made King's counsel in the Admiralty in 1665, S.P. Dom. 1664-1665, 427.

[2] Wynne i *lv*. [3] Ibid *xv*.

[4] Ibid *xv*; and, says Wynne, "whoever considers the nature of this court, must allow Dr. Jenkins, or at least a person of his disposition, to have been proper for it; for 'tis a court where the suitors are generally very miserable people, shipwreckt or undone persons, poor prisoners in gaol, some for debt, others for crimes, whom the judge and register are forced not only to forgive their dues, but to be at the charge of keeping those that are to answer in justice, from starving in the meantime," ibid.

[5] Ibid *xvii-xviii*.

[6] "When the King was wont to entertain himself in the D. of P. lodgings, Sir Leoline always avoided going thither, well knowing how difficult it was to resist the inquiries of a person of that quality, and of a temper naturally inquisitive, without losing the reputation of good manners. Whereas many other ministers were glad of such opportunities to make their addresses there; but he chose rather to wait without the King's leisure, and that good-natured prince, who knew the man, and would not let his pleasures interfere with publick business, upon the first notice came out and dispatched him," ibid *lviii*.

was Jenkins's equal and perhaps superior in ability, and his superior in the influence which he exercised over the development of maritime and Prize law.

At the end of the seventeenth and the beginning of the eighteenth centuries there was one civilian—Sir William Trumbull—who, like Jenkins, became an ambassador and a secretary of state; there was another civilian—Sir Charles Hedges—who became secretary of state; and there was a third civilian—Sir Henry Newton—who became an ambassador.

Sir William Trumbull [1] (1639-1716) was the grandson of William Trumbull, a diplomatist, who died in 1635. He was a member of St. John's College, Oxford, and a fellow of All Souls. He took his degrees in civil law, and in 1667 he was practising as an advocate in the Chancellor's court at Oxford. In 1668 he was admitted as an advocate to Doctors' Commons. Burnet said that he was one of the ablest of the advocates.[2] In 1683 he went with Pepys to Tangier on the expedition commanded by Lord Dartmouth, as judge advocate of the fleet, and as commissioner to settle some questions which had arisen between the King and the inhabitants as to the leases of their houses. Pepys was at first surprised that Trumbull knew so little of the work of judge-advocate; [3] but, later, he and Trumbull got on well together,[4] till Trumbull, having fallen sick, was anxious to return. Pepys then denounced him, somewhat unjustly, as "a man of the meanest mind as to courage that ever was born," [5] and depreciated his services.[6] Trumbull was knighted in 1684, and given the post of clerk of deliveries of ordonnance stores, a post which he gave up when he was sent as envoy to France in 1685. He was recalled in 1686—his Protestant principles, and the help which he gave to the Huguenots after the revocation of the edict of Nantes, did not recommend him to James II.[7] In 1686 he was sent on an embassy to Turkey, and did not return till 1691. In 1694 he became a lord of the Treasury, and in 1695 secretary

[1] D.N.B.; Coote, English Civilians 91-93.

[2] "He was the eminentest of all our civilians, and was by much the best pleader in those courts, and was a learned a diligent and a virtuous man," History of His Own Times (folio ed.) i 769.

[3] "Strange to see, how surprised and troubled Dr. Trumbull shows himself at this new work put on him of a Judge-Advocate; and how he cons over the Law-Martial, and what weak questions he asks me about it," R. G. Howarth, Letters and Second Diary of Pepys 379.

[4] His letters to Trumbull before they started showed some cordiality, ibid 150, 151-152, and the first part of the Diary shows that their relations remained cordial.

[5] Ibid 409.

[6] Ibid 415; cp. 416 where he praises Trumbull's letter to Jenkins; Pepys's parting shot is as follows: "We all walked down, saw him in the boat, and gave him several guns from the town. So the fool went away, every creature of the house laughing at him," ibid 419.

[7] Burnet, History of His Own Times (folio ed.) i 769; H. C. Foxcroft, Supplement to Burnet's History 377-378.

of state, and secretary to the Lords Justices. He resigned his post of secretary to the Lords Justices in 1697, in disgust at his treatment by them—they treated him, he said, like a footman and not like a secretary.[1] He ceased to be secretary of state in 1698; and he refused an offer, which was later made to him, to resume that office. Macaulay describes him as "a learned civilian and an experienced diplomatist of moderate opinions and of temper cautious to timidity"; [2] but "hardly equal to the duties of his great place." [3] He was a man of letters, and a friend of Dryden and Pope. When, in 1756, All Souls College decided to ornament the newly completed Codrington Library with busts of its most eminent members, Trumbull was among the number of the select.[4]

Charles Hedges [5] was a member of Magdalen Hall and College, Oxford, and was admitted to Doctors' Commons as an advocate in 1675. He was made chancellor of Rochester diocese in 1686, and when Raines was dismissed from his post as judge of the court of Admiralty in 1689, he succeeded him. He remained judge of the Admiralty till his death in 1714,[6] but was assisted by Dr. Bramston who acted as his deputy.[7] In 1700, by the influence of the Earl of Rochester, he was made secretary of state. He held that post till 1706. In 1711 he succeeded Raines as judge of the Prerogative Court. He died in 1714. He was a Tory in politics—though he sometimes voted with the Whigs if he thought it for his interest to do so. The duchess of Marlborough hated him, and told the Queen that he had "no capacity, no quality, no interest," and that he was a mere dependent of Lord Rochester. This is a biassed verdict. The editor of the calendar of State Papers Domestic, after a study of his letters, has come to a very different conclusion. "The great issue of the war," he says, "the preservation of the European balance, is clearly present to him; and every commercial and diplomatic consideration is clearly reviewed in his remarkable letters." [8] We shall see that, as a judge of the court of Admiralty, he had considerable merits.[9]

Henry Newton [10] (1651-1715) was a member of St. Mary's Hall and Merton College, Oxford. It was at Oxford that he began his life-long friendship with Somers, although he held political

[1] Burnet, op. cit. (ed. 1823) iv 366 *note*.
[2] History, chap. xxi. [3] Ibid xxiii.
[4] Montagu Burrows, Worthies of All Souls 390.
[5] D.N.B.; Coote, English Civilians 98.
[6] Marsden, Law and Custom of the Sea ii 126 n.; the statement in the D.N.B. that he resigned this post in 1701 is incorrect—it is clear that he was the judge of the Admiralty in 1704, S.P. Dom. 1703-1704, 496, 498.
[7] Coote, English Civilians 101.
[8] S.P. Dom. 1703-1704 xii. [9] Below 669-670.
[10] D.N.B.; Coote, English Civilians 100-101.

views which were completely opposed to those of his friend. He was admitted as an advocate to Doctors' Commons in 1678. In 1685 he became chancellor of the diocese of London, and in 1694 judge advocate to the Admiralty. In 1704 he went as envoy to Florence, and in 1706 to Genoa. While in Italy he corresponded with the Pope, became a member of several learned societies, and was very popular with the Italians. He returned to England in 1709. In 1714 he was made judge of the court of Admiralty and knighted.[1] He died in the following year.

John Cooke [2] (1666-1710), who became dean of the Arches and advocate-general, was another civilian who was employed on important business of state. He was one of the commissioners who, in 1702, conducted the negotiations which led to the Act of Union with Scotland. But in the course of the eighteenth century the civilians ceased to take so important a part in political life. Though some of them, e.g. Sir George Lee [3] and Sir George Hay,[4] were distinguished members of the House of Commons, they were not given important offices in the executive government. It is true that Frederic Prince of Wales and, later, Newcastle, had thought of making Sir George Lee chancellor of the exchequer. But Newcastle's project fell through; and one of the reasons given by Horace Walpole to explain why it fell through is a sufficient reason why the civilians ceased to take so important a part in the political life of the country. Walpole says: [5]

> though he was a speaker of great weight in Parliament, which was set off with a solemn harmonious voice, and something severe in his stile, the business of civilian had confined him to too narrow a sphere for the extensive knowledge of men that is requisite to a prime minister.

The trade of lawyer and judge, and the trade of politician, were coming to be more sharply differentiated.

The Revolution affected the position of some of the civilians holding judicial or other offices in the government, just as it affected the benches of the common law courts.[6] Sir Richard Raines [7] ceased to be judge of the court of Admiralty, though he retained his position as judge of the Prerogative court; and we

[1] He had formerly refused this office because, according to his daughter, "he could not bear to pronounce sentence of death upon his fellow-creatures, tho' pyrates"; but Coote more probably suggests that, like Oldys, below 664, he was a Tory who did not approve of the proceedings for piracy taken against the privateers, who were operating under commissions from James II.

[2] D.N.B.; Coote, English Civilians 105-106.

[3] Below 666-669. [4] Below 672-674.

[5] *Memoirs of the Last Ten Years of George II's Reign* i 78; he wrote of him in his letters that, "he is a grave man, and a good speaker, but of no very bright parts, and, from his way of life and profession, much ignorant of, and unfit for, a ministry," Letters (Toynbee's ed.) ii 361.

[6] Vol. vi 514-516. [7] Coote, English Civilians 95.

have seen it was the question of the validity of the commissions to privateers issued by James II which prevented Newton from becoming the judge of the court of Admiralty.[1] In fact it was this question which created the greatest difference of opinion among the civilians. If James had ceased to be a King either *de jure* or *de facto* it was clear that these commissions were void, and that those who acted under them could be indicted for piracy. If, on the other hand, he still continued to be a King, though deposed, those who acted under his commissions were not pirates. It might be reasonable to say that he had the prerogative of a King *de facto* so long as the struggle between him and William III continued.[2] But it was hardly possible to make this assertion when the struggle was ended, without denying the power of Parliament to alter the succession. Nevertheless this was the position taken up by William Oldys,[3] who had been advocate of the Admiralty under James II, and who had retained this position under William III; and he was supported in this opinion by Sir Thomas Pinfold,[4] the advocate-general.[5] Oldys's view was that, though a King "may be deposed of his crown, he cannot lose his right"; [6] that, since he was recognized as King by Louis XIV, he had "a colourable authority" [7] in France to issue these commissions; and that this authority given to persons in France prevented them from being treated as pirates. The secretary of state and Lord Falkland said that this opinion amounted almost to high treason.[8] On the other hand, Doctors Tindall and Littleton took the sound Whig view, which was also the sounder legal view.[9] Littleton said: [10]

> King James was now a private person; wee had no war with him, nor he with us; or if he desired to have, he is not in a capacity for makeing war; he can neither send nor receive embassadours, and those that adhere to him are not enemies but rogues, and consequently these persons are no privateers but pirates.

It is not surprising that Oldys lost his office and that Littleton succeeded him.[11]

[1] Above 663 n. 1.

[2] This was the opinion of R. Walton, and of those who thought that persons taken while the struggle continued were not indictable for piracy or treason, see the opinions cited by Marsden, Law and Custom of the Sea (Navy Records Soc.) ii 147-148.

[3] D.N.B.; Coote, English Civilians 93-95. [4] Ibid 93.

[5] Marsden, Law and Custom of the Sea ii 142-148, has printed the debate before the Privy Council on this occasion, and the opinions given by the different civilians consulted. [6] Ibid 143. [7] Ibid 144. [8] Ibid 145.

[9] The view that a deposed sovereign has none of the rights of a sovereign had been acted on by Elizabeth when she tried, condemned and executed Mary Queen of Scots, vol. v 45.

[10] Law and Custom of the Sea ii 146.

[11] Coote, op. cit. 95, tells us that Oldys "continued to practice as an advocate with great reputation and success" till his death in 1708; he adds that "as a scholar, he was respectable; as a civilian, he was learned; as a pleader, eloquent and judicious."

We have seen that the victory of the common law courts had reduced the ordinary business of the court of Admiralty to very small dimensions.[1] On the other hand, it was recognized that its Prize jurisdiction was exclusive,[2] so that in time of war it was a busy court. But, in the absence of regular reports, it is difficult to estimate the extent and value of the contributions to maritime and Prize law made by its judges; and for the same reason it is difficult to estimate the extent and value of the contributions made to the various branches of ecclesiastical law by those civilians who held the positions of dean of the Arches or judge of the Prerogative court. It is not till the end of this period that reports of maritime and ecclesiastical cases begin to appear.[3] But we have seen that some reports of the earlier decisions and opinions given by the civilians in the ecclesiastical courts and the court of Admiralty were published in the last century;[4] and these, together with Marsden's collection of records and other documents in his two volumes on *The Law and Custom of the Sea*, enable us to say something of the work of one or two of the most prominent civilians of this period in the spheres of ecclesiastical, maritime, and Prize law.

Two of the most eminent civilians who presided in the ecclesiastical courts during this period were Dr. Bettesworth and Sir George Lee.

Bettesworth[5] succeeded Sir John Cooke as dean of the Arches in 1710, and Sir Charles Hedges as judge of the Prerogative court in 1714. He held these positions till his death in 1751. It was while he was dean that the difficulty occurred as to the renewal of the lease of the premises held by Doctors' Commons from the Dean and Chapter of St. Pauls.[6] Dr. Bettesworth, as dean of the Arches, was the plaintiff in the action which ensued, and thus gave his name to a case in which important points in the law of specific performance were decided.[7] Some of his decisions are preserved in an appendix to the second volume of Sir George Lee's reports. He held in 1728 that if a married woman had separate estate, she had power to dispose of it by will.[8] In this case he gave a ruling as to the construction of the marriage articles under which the woman took her separate estate; and in another case he gave a decision as to the construction of a will.[9] He held that in the ecclesiastical

[1] Vol. i 557-558.
[2] Ibid 564-565; above 626.
[3] Above 105.
[4] Above 106-107.
[5] Coote, English Civilians 109.
[6] Above 47-48.
[7] Bettesworth v. Dean and Chapter of St. Pauls (1726) Cases t. King 66; S.C. on appeal (1728) 1 Bro. P.C. 240; Fry, Specific Performance (6th ed.) §§ 60, 477, 1008.
[8] Keller v. Bevoir (1728) 2 Lee 563.
[9] Cremer v. Dakins (1728) 2 Lee 592-593.

courts, as in the court of Chancery, witnesses could not be examined *viva voce*.[1] In proceedings by a wife for a divorce, he held that, if there was a reconciliation between the husband and wife, and after that fresh acts of cruelty by the husband, the court could look at the whole conduct of the husband both before and after the reconciliation.[2] In two cases he considered the law as to grants of decrees of nullity of marriage by reason of impotency.[3] Though Lee sometimes refused to follow his decisions, he often did follow them; and the fact that he did so is good evidence of Bettesworth's ability; for Lee was probably the ablest of the ecclesiastical judges of this period. At any rate it is certain that the publication by Joseph Phillimore of Lee's careful notes of his decisions enables us to estimate the contribution which he made to the various branches of ecclesiastical law, more accurately than is possible in the case of his predecessors.

Sir George Lee (1700-1758)[4] was the younger brother of Sir William Lee, the chief justice of the King's Bench.[5] He was an undergraduate of Clare College, Cambridge, from whence he migrated to Christ Church, Oxford. He was admitted as a member of Doctors' Commons in 1729, and entered Parliament in 1732. He soon made his mark in the House of Commons. He attached himself to the party of Frederic, Prince of Wales; and it was his election by four votes to the position of chairman of the committee of privileges and elections that presaged the downfall of Walpole. In 1742 he became a lord of the Admiralty, and in 1751 the treasurer of the household of the dowager Princess of Wales. In the same year he succeeded Bettesworth as dean of the Arches and judge of the Prerogative court. In 1757 he resigned his position of treasurer of the household to the Princess of Wales; and if Newcastle had succeeded in his project of forming a ministry without Pitt, Lee was to have been his chancellor of the exchequer—a post which Frederic had designed for him when he succeeded to the throne. He died in 1758. Lee was an effective speaker in Parliament and a good debater. Horace Walpole classed him and Hay[6] as two of the thirty best speakers in the House.[7] But he was more famous as a lawyer than as a statesman. In fact, as we have seen,[8] his devotion to his work as a lawyer unfitted him for a position as a leading minister.

[1] Jones v. Yarnold (1728) 2 Lee 568.
[2] Worsley v. Worsley (1730) 2 Lee 572.
[3] Aleson v. Aleson (1728) 2 Lee 576; Welde v. Welde (1730) ibid 578.
[4] Memoir prefixed by Joseph Phillimore to his reports; D.N.B.; Coote, English Civilians 113-115.
[5] Above 442-446.
[6] Below 672-674.
[7] Memoirs of the Last Ten Years of George II's reign i 486.
[8] Above 663.

The notebooks in which Lee, from the beginning of his professional career, entered the particulars of the cases in which he was concerned, are, as Phillimore has said, "authentic monuments of extraordinary diligence and care." [1] That he was a good international lawyer and a master of Prize law is shown by the celebrated paper, which he and Mansfield had the chief share in compiling, in answer to the complaints of Frederic II.[2] But it is chiefly as an ecclesiastical lawyer that he is known to us; for he left in his notebooks "a statement of the particulars of every case that was brought before him for judgment, a summary of the arguments of counsel, and a precis of his own sentence." [3] These notebooks, which Joseph Phillimore edited and published in 1833, enable us to form some conclusions as to his legal abilities. In very many cases the judgments consist of a short statement that Lee found for one or other of the parties. But they are always prefaced by a careful analysis of the evidence and of the arguments of counsel, so that it is always possible to see the grounds upon which he based his decision. In some cases there is a short but careful statement of the law; and these cases cover the whole field of ecclesiastical jurisdiction—testamentary, matrimonial, and matters of exclusively ecclesiastical cognizance.

One of the most notable of the *testamentary cases* was the case of *Helyar v. Helyar*,[4] in which very important points as to the revocation of wills, and the evidence by which a revocation can be established, were settled. Other cases deal with the difficult question of the circumstances in which an unexecuted will, which the testator intended to be operative, could be admitted to probate.[5] These cases show the wisdom of the provision made by the Wills Act 1837,[6] that no will shall be valid unless made in the form prescribed by the Act. He held, in accordance with previous decisions, that marriage and the birth of a child revoked a will.[7] One of his decisions distinguished the position of a trustee from that of an executor; [8]

[1] 1 Lee xv.

[2] Above 469-470; for some of his opinions in Prize cases see Burrell, Reports 359-365; in one of these opinions he states that a sentence of condemnation is conclusive till it is reversed, ibid 363-364; in 1746 he and Murray advised that, apart from any special commission, the courts of Admiralty of England and Scotland had an inherent jurisdiction to try Prize cases, Law and Custom of the Sea ii 330; for two opinions on maritime law—one on the rights of the part owners of a ship, and the other on the rights of seamen to wages for the part of a voyage on which freight had been earned—see Burrell, Reports 393-395.

[3] 1 Lee xv.

[4] (1754) 1 Lee 472.

[5] Lamkin v. Babb (1752) 1 Lee 1; cp. Seeman v. Seeman (1752) 1 Lee 180; Jekyll v. Jekyll (1753) 1 Lee 419; L'Huille v. Wood (1754) 2 Lee 22.

[6] 7 William IV and 1 Victoria c. 26.

[7] Braddyll v. Jehen (1755) 2 Lee 193.

[8] Boddicott v. Dalzeel (1756) 2 Lee 294.

in another, the question when a person was executor according to the tenor was considered;[1] and in another he held that a will made by a minor in favour of a guardian and schoolmaster was valid, if it was the clear and uninfluenced act of the testator.[2]

Among the *matrimonial cases* there are several cases of suits for jactitation of marriage.[3] In the then state of the law as to the formalities of a valid marriage[4] these cases often gave rise to some very difficult questions of fact. Similarly, if a contract of marriage *per verba de presenti* were proved, a suit could be brought for an order that the defendant do solemnize the marriage in church.[5] The latter class of cases was put an end to by Lord Hardwicke's Marriage Act;[6] and the same Act, by simplifying the question whether or no a marriage had taken place, gradually eliminated the former class of cases. It was settled that in a nullity suit, if the fact of marriage was established, the husband was liable for his wife's costs;[7] but that if a wife with separate property sued for the restitution of conjugal rights, she must pay her own costs.[8]

Many of Lee's decisions deal with matters of *exclusively ecclesiastical cognizance*, civil and criminal. Among civil cases there are decisions as to the levy of a church rate,[9] as to the right to elect church-wardens,[10] as to the right to nominate an incumbent to a chapel of ease,[11] as to tithes,[12] as to the procedure for removing a parish clerk,[13] as to the right to charge a fee for weddings.[14] Among the criminal cases there are decisions as to suits for brawling in church,[15] for indecent behaviour in church,[16] and for defamation.[17] In addition there are decisions as to the spheres of the jurisdiction of a bishop's chancellor and of a com-

[1] Pickering v. Towers (1757) 2 Lee 401.
[2] Arnold v. Earle (1758) 2 Lee 529.
[3] Walton v. Rider (1752) 1 Lee 16; Wescombe v. Dods (1752) 1 Lee 59; Butler v. Dolben (1756) 2 Lee 312; Blackstone, Comm. iii 93, defines the cause of action in these suits as follows: "When one of the parties boasts or gives out that he or she is married to the other, whereby a common reputation of their marriage may ensue. On this ground the party injured may libel the other in the spiritual court; and, unless the defendant undertakes and makes out a proof of the actual marriage, he or she is enjoined perpetual silence upon that head; which is the only remedy the ecclesiastical courts can give for this injury."
[4] Vol. x 82; vol. xi 609-610; above 249.
[5] Baxter v. Buckley (1752) 1 Lee 42; cp. Bl. Comm. i 439.
[6] 26 George II c. 33; vol. xi 609-610; Bl. Comm. i 439, iii 93-94.
[7] Bird v. Bird (1753) 1 Lee 209. [8] Holmes v. Holmes (1755) 2 Lee 90.
[9] Lilly v. Hardy (1752) 1 Lee 52.
[10] Governors of St. Thomas's Hospital v. Trehorne (1752) 1 Lee 126.
[11] Line v. Harris (1752) 1 Lee 146.
[12] Harry v. Littleton (1753) 1 Lee 201.
[13] Barton v. Ashton (1753) 1 Lee 350, 460, 533.
[14] Patten v. Castleman (1753) 1 Lee 387.
[15] Foote v. Richards (1753) 1 Lee 265.
[16] Lloyd v. Owen (1753) 1 Lee 434.
[17] Ware v. Johnson (1755) 2 Lee 103.

missary appointed by the bishop,[1] as to a chancellor's powers,[2] and as to the jurisdiction of the court of the Arches.[3] Phillimore has accurately summed up the characteristics of Lee's reports when he says: "the judgments are deliberate but succinct; they are characterized by perspicacity and simplicity of style; and are based on sound and extensive learning." He adds that they illustrate "the uniformity of principle which has for so many centuries regulated the decisions of our highest ecclesiastical tribunals."[4]

Five of the most eminent civilians who presided in the court of Admiralty are Sir Charles Hedges, Sir Henry Penrice, Sir Thomas Salusbury, Sir George Hay, and Sir James Marriott.

Of the career of Sir Charles Hedges I have already spoken.[5] We have seen that he was a judge both of the court of Admiralty and the Prerogative court. But he was only judge of the latter court for three years. It was during the long period that he acted as judge of the court of Admiralty and of the Prize court that he did his most important work. His decisions and opinions are important in the spheres of constitutional law, international law, Prize law, and maritime law.

In the sphere of constitutional law he united with the judges of the common law courts in stating the principle that a rule of English law cannot be varied by a treaty. Hedges and the common law judges held that, since a British subject had a right to have his claim to goods captured by a foreign privateer and brought to this country, tried in the court of Admiralty, the Crown could not by treaty exclude this right, by a provision that the claim should be tried by the courts of the state to which the privateer belonged.[6] Similarly, he advised the Crown that, since a captor had a statutory right to his prize, it was not advisable for the Crown to stay proceedings in the Prize court at the instance of a foreign minister.[7] These cases show that, since the Revolution, constitutional principles were emerging more clearly.[8] In 1699 and 1713 he advised the Crown as to the limits of the British seas[9]—an important question when so much importance was attached to the obligation to salute the King's ships in those seas.

In the sphere of international and prize law he gave some

[1] Hillyer v. Milligan (1754) 2 Lee 8.
[2] Smith v. Lovegrove (1755) 2 Lee 162.
[3] Butler v. Dolben (1756) 2 Lee 312.
[4] Dedication to Lord Brougham 1 Lee vi. [5] Above 662.
[6] Marsden, Law and Custom of the Sea ii 124-126; the opinion was signed by Holt C.J., Pollexfen C.J., Hedges, Treby, Somers, and Thomas Pinfold.
[7] Ibid 215-217.
[8] In 1684 no doubts were cast upon the power of the Crown to affect the rights of British subjects by a treaty, ibid 111-112.
[9] Ibid 231-233.

interesting opinions. Like Jenkins,[1] he held that the Prize court "is as much obliged to observe the law of nations, with respect to the municipall laws of the realm, as the judges and courts at Westminster are bound to proceed according to statutes and the common law."[2] He therefore refused to condemn some Hamburg ships, partly because his commission only gave him power to condemn enemy ships, and partly because the emperor of Germany had not consented to a course which otherwise could not be justified by the rules of international law.[3] On the other hand, he recognized that he must act if specially commissioned to do so by the Crown.[4] He held that the only proper jurisdiction to try the validity of captures made by British ships was the court of Admiralty.[5] He advised, first, that a ship of one belligerent could be protected by a British ship against an attack at sea by another; and, secondly, that a privateer could be detained in port twenty-four hours after a ship belonging to the country with which the privateer was at war had departed.[6]

In the sphere of maritime law some of the cases decided by him illustrate the kind of cases which then fell within the civil and the criminal jurisdiction of the court of Admiralty. On the civil side, he entertained actions against the ship to enforce a ransom contract;[7] and he applied the rule that in suits for collision, where both parties are in fault, the damages must be divided.[8] On the criminal side we have seen that he defined piracy *ex jure gentium* as "a sea term for robbery."[9] This definition was long regarded as authoritative.[10] But we have seen that it was criticized by Stephen;[11] and it has recently been held by the Privy Council that it is both too wide and too narrow —too wide in that it would include a robbery committed by one passenger or member of the crew on another, and too narrow in that it excludes an attempt to rob, and other kinds of violent acts, or attempts at violent acts, committed without lawful authority by persons in control of a ship, or by persons seeking to get control of it.[12]

[1] Above 651-652, 653; vol. i 566.
[2] Law and Custom of the Sea ii 132.
[3] Ibid 132-136.
[4] Ibid 133.
[5] Ibid 213-214; apparently privateers had taken their prizes to Naples, and the validity of their capture had been adjudicated upon there.
[6] Ibid 217-218; as to the second rule see Hall, International Law (6th ed.) 623-624.
[7] Law and Custom of the Sea ii 234-235; over these contracts the common law courts had a concurrent jurisdiction, vol. i 557 n. 6; for the view taken by them of these contracts see above 534-535.
[8] Trew v. Peirce (1692) Burrell, Reports 264; Beckham v. Chapman (1695) ibid 270; Rennen v. Humble (1698) ibid 280; for this rule see vol. viii 266-269.
[9] R. v. Dawson (1696) 13 S.T. at p. 454; vol. vi 401.
[10] Ibid; Attorney-General for Hong Kong v. Kwok-a-Sing (1873) L.R. 5 P.C. at pp. 199-200.
[11] Vol. vi 401 n. 9.
[12] *In re* Piracy Jure Gentium [1934] A.C. 586.

Penrice, Hedges' successor as the judge of the court of Admiralty, held that office from 1715 to 1751;[1] and his son-in-law, Salusbury, succeeded him, and held it from 1757 to 1773.[2] Both were capable civilians, but nothing more. We know little of the men themselves; and the printed records only give us a scanty record of a very few of the cases which they decided.

Penrice objected to give the government advice upon cases pending before him in the court of Admiralty;[3] but he did not show the same conscientiousness as Jenkins and Hedges, that in his Prize court he ought to be the independent administrator of international law. We have seen that he asked the government for a ruling as to whether certain articles were contraband;[4] and in 1744, in a report on some pending prize cases, he said that he would endeavour "punctually to observe" the provisions of treaties between Great Britain and neutral powers, and "such further regulations and instructions as I shall from time to time receive."[5] He, like Hedges,[6] gave a ruling as to the extent of the British seas;[7] he gave a hesitating opinion as to the disposal of foreign ships recaptured from the Moors;[8] and a decided opinion that the capture of a ship by an enemy in the Downs was a violation of British sovereignty, and that the ship must be at once restored.[9] He reasserted the rule that "by the laws of nations enemies' goods found on board neutral ships (though not contraband) may be seized as good and lawfull prize, when there is no express treaty to the contrary";[10] and he ruled that it would be illegal to give blank commissions to Dutch privateers to sail under English colours, because the requisite security could not be taken against the commission of illegal acts.[11] He held that the Warden of the Cinque Ports could seize the goods of Englishmen who had traded with the enemy, since this was not a question which fell within the Prize jurisdiction of the court.[12]

Salusbury decided several cases of claims by seamen for their wages; and, whenever possible, he gave a decision in their favour. In an action by a mate for wrongful dismissal he gave

[1] Coote, English Civilians 108-109.
[2] Ibid 117; E. S. Roscoe, Studies in the History of the Admiralty and Prize Courts 29-30.
[3] Law and Custom of the Sea ii 345. [4] Above 653 n. 5.
[5] Law and Custom of the Sea ii 311; E. S. Roscoe, History of the Prize Court 43-44.
[6] Above 669.
[7] Law and Custom of the Sea ii 256-257—the term "British seas" had been used in the convention with Spain made in 1719, and the lords of the Admiralty wanted to get an interpretation of it.
[8] Ibid 239-240. [9] Ibid 243-245. [10] Ibid 310. [11] Ibid 300-302.
[12] The Duke of Dorset (1744) Burrell, Reports 316; though the Cinque Ports had exercised a Prize jurisdiction in the seventeenth century, they were deprived of it in 1702, vol. i 533 and n. 1.

judgment for the mate, saying that, while he would always endeavour to discourage obstinacy and disobedience in the sailor, he would also endeavour to prevent cruelty and tyranny in the captain.[1] He held that the statutes of limitation were no bar to an action *in rem* and *in personam* for wages ;[2] and that the fact that a ship had been destroyed by order of the governor of Bencoolen, to prevent her falling into the hands of the French, did not prevent the sailors from recovering their wages.[3] On the other hand, a master could not sue in the court of Admiralty for his wages ;[4] and therefore it was held that he could not sue for money which he had advanced to pay the sailors.[5] He held in one case that a bottomry bond given by a captain who was an infant was binding on the owners ;[6] and in another that a prior bottomry bond was payable before a later bond[7]—a proposition which a later case, decided by Sir George Hay, shows was not true in the case of bonds given abroad by a master.[8] A master who had been dismissed was restrained from putting to sea, and he was ordered to deliver up the ship to the master appointed by the majority of the owners.[9] The capitulation under which Havannah surrendered gave rise to some difficult cases as to what property passed under it ;[10] and the Navigation Acts and Acts against smuggling gave rise to a claim for forfeiture which is elaborately reported.[11] In these reports the arguments are often given at some length ; but the remarks of the judge are reported very shortly. If they are a faithful report of his remarks his ability as a judge was very mediocre.

Sir George Hay[12] (1715-1778) was a more notable judge than either of his two predecessors. He was a member of St. John's College, Oxford, and was admitted as an advocate to Doctors' Commons in 1742. He became a member of the House of Commons in 1754, where he soon made his mark. Horace Walpole praises his manner of speaking, but he considered that the matter of his speeches was very ordinary.[13] He supported

[1] Davis v. Rotch (1766) Burrell at p. 23 ; cp. Fell v. The Dorothy (1766) ibid at p. 13 where he animadverted upon the conduct of captains who " try to shuffle off the demands of poor seamen."

[2] Elliott v. Lister (1756) Burrell 320.

[3] Bennet v. Buggin (1766) Burrell 24.

[4] Vol. i 557 n. 6.

[5] Holland v. Proceeds of the Royal Charlotte (1768) Burrell 76.

[6] Day v. Wolfe (1768) Burrell 88.

[7] Dunlop v. Proceeds of the Neptune (1769) Burrell 97.

[8] Mackensie v. Ogilvie (1774) Burrell 134.

[9] Adams v. Crouch (1771) Burrell 110.

[10] St. Juan de Luz v. Pococke (1766) Burrell 5 ; Nostra Senora De La Luz (1767) ibid 47 ; the Constanza (1763) ibid 161.

[11] Brown v. Kenyon (1767) Burrell 30.

[12] D.N.B. ; Coote, English Civilians 118-119.

[13] " Dr. Hay's manner and voice resembled Lord Granville's, not his matter ; Lord Granville was novelty itself ; Dr. Hay seldom said anything new ; his speeches

Pitt, who made him a lord of the Admiralty in 1756—a post which he held (with a short interval) till 1765. In that capacity he signed the warrant for the execution of Admiral Byng.[1] Meanwhile he had been rising in his profession. In 1755 he became vicar-general, and King's advocate in the court of Admiralty. In 1764 he became dean of the Arches and judge of the Prerogative court, and in 1773 judge of the court of Admiralty. Hay shone in society. It is said that Garrick delighted in his company, and he was a friend of Wilkes. But his private life, like that of Wilkes, was irregular. He died suddenly in 1778—"Romano magis quam Christiano more" men said.

It was said that Hay was lax in the performance of his professional duties. But Thurlow said of him that he was "an able and excellent judge";[2] and his opinions and decisions show that he was a very capable lawyer. While he was an advocate he gave some sound opinions. Instances are his opinion as to the trial in the court of Admiralty of sailors who had forcibly resisted a press gang;[3] as to the condemnation of prizes taken by the East India Company's ships;[4] as to the proper manner of proceeding on a ransom contract;[5] as to the illegality of an instruction to privateers which was contrary to an Act of Parliament.[6] His decisions as judge of the court of Admiralty are clearly expressed and show a grasp of principles. Illustrations are a case in which he refused to decide a dispute between the part owners of a ship, till a pending suit before the court of Chancery as to the ownership of some of the shares had been settled—a question which he held was for the court of Chancery and not for the court of Admiralty;[7] a case in which he held that the court had jurisdiction to try the question whether one ship had damaged another in Greenwich reach;[8] and a case as to the priority of bottomry bonds.[9] As judge of the Prize court he showed a due regard for the rights of neutrals. "I cannot judge politically," he said,[10] "nor have I any discretionary power but on legal grounds"; but, like his predecessors, he considered that the interpretation of treaties was a matter for the Privy Council, and that the Crown could make

were fair editions of the thoughts of other men: he should always have opened a debate," Memoirs of the Last Ten Years of the Reign of George II i 488.

[1] Ibid ii 139.

[2] "The most loose and unconsidered notion escaping in any manner from that able and excellent judge, should be received with respect, and certainly will," Duchess of Kingston's Case (1776) 20 S.T. at p. 462.

[3] Burrell, Reports 365-370. [4] Ibid 392. [5] Ibid 398.

[6] Law and Custom of the Sea ii 381-382.

[7] Meake v. The Lord Holland (1774) Burrell 145.

[8] Fairless v. Thorsen (1774) Burrell 130.

[9] Mackensie v. Ogilvie (1774) Burrell 134; above 672.

[10] The Hendric and Alida (1777) Hay and Mar. at p. 138.

rules for the proceedings of his court.[1] The Act of 1776,[2] which cut off all commercial intercourse with the rebellious American states, and provided that ships and cargoes coming from America should be confiscated, raised some difficult problems for the court. It was clearly not right to apply the Act to the property of loyalists who had fled or had been expelled from America. Those cases, he thought, "called for a humane interpretation" of the Act.[3] It was not easy, as he said, to draw the line;[4] but he held that he ought to distinguish between the case of persons who could not or did not intend to return, and those who could return, and very probably would.[5] In one of the cases arising out of the American war [6] he gave a decision condemning a ship as a droit of the Admiralty, which he afterwards admitted was wrong [7]—a view which is supported by a decision of Lord Stowell,[8] which has been followed in this century.[9] These illustrations show that Hay was a sounder lawyer, and that he had a far more judicial temperament than his successor, Sir James Marriott.

James Marriott [10] (1730?-1803) was a member, a fellow, and, from 1764 till his death, the master of Trinity Hall, Cambridge. He was admitted as an advocate to Doctors' Commons in 1757. In 1764 he became King's advocate by interest, Coote says, but, according to Lord Sandwich, by reason of his ability "exclusive of other considerations." In 1767 he became vice-chancellor of Cambridge University, and in 1768 he was an unsuccessful candidate for the chair of modern history. In 1778 he was made judge of the court of Admiralty, and in 1781 he entered Parliament.[11] He resigned his position as judge of the court of Admiralty in 1798, and died in 1803.

Marriott was by nature an impulsive man who meant well. He was also an industrious man of considerable learning; and,

[1] "The treaties with foreign powers are but known and understood by his Majesty's Privy Council; and his Majesty has power to make further rules for proceedings in his courts of Admiralty," ibid; above 653, 670, 671.

[2] 16 George III c. 5.

[3] The Sally (1777) Hay and Mar. at p. 92.

[4] "In fixing the sense of an Act of Parliament, open to many new circumstances, arising every day in the course of this uncommon kind of war and rebellion, it is not easy to draw the line between equity and humanity on one side, and strict law and severity meant to crush the progress of rebellion, and cruelties, on the other. If intentions and apprehensions can be admitted on the part of claimants, upon their own oaths, and in their own favour, then the Act prohibiting all trade and intercourse with the American colonies in rebellion, will be a piece of waste-paper," ibid at pp. 94-95.

[5] Ibid at p. 94.

[6] The Dickenson (1776) Hay and Mar. 1.

[7] Ibid at p. 49 *note*.

[8] The Maria Francoise (1806) 6 C. Rob. at p. 297.

[9] The Abonema and other Ships [1919] P. 41.

[10] D.N.B.; Coote, English Civilians 124-125; E. S. Roscoe, Studies in the History of the Admiralty and Prize Courts 28-34.

[11] He was a member of Parliament from 1781-1784, and from 1796-1802.

being possessed of oratorical ability, he was an effective advocate. But he was vain, wanting in common sense, and endowed with little of that sense of personal dignity, and with less of that discretion in thought and speech, which public opinion demands of a judge. In his youth he was a suitor for the hand of Hester Salusbury, the niece of Sir Thomas Salusbury, and afterwards Mrs. Thrale and Mrs. Piozzi. But she refused him with some brusqueness.[1] In spite of his abilities, she regarded him as a rather foolish bore; and, to some extent, her verdict was endorsed by his contemporaries at Cambridge, in Parliament, and at Doctors' Commons. Gray said of him at Cambridge, "his follies let us pardon for he has some feeling and means well."[2] In Parliament he argued that the thirteen American colonies were represented in the House of Commons, because, by their charters, they held of the manor of Greenwich in Kent; and he tried to justify this absurdity in spite of the ridicule with which it was received.[3] Coote, who was his contemporary at Doctors' Commons,[4] says of him that "he was less deficient in talents than in soundness of judgment . . . When he filled the judicial chair, the attendants of the court were sometimes induced to imagine that they were listening to the desultory remarks and jocular effusions of the president of a festive meeting."[5]

Coote's verdict upon him as a lawyer is borne out by the reports of his decisions. There is no doubt as to the effectiveness of some of his arguments as King's advocate—examples are his arguments in the case of *The Dickenson*,[6] and *The Hendric and Alida*.[7] In 1764, when King's advocate, he gave a well-reasoned opinion that a ship belonging to the King of Spain was subject to the jurisdiction of the Prize court, because that court proceeded, not according to the municipal laws of England, but according to international law; and that it was useless to ask the Crown to give any relief against its decision "because nothing can supersede the determinations of a court not subject to the

[1] For this episode in his career see Roscoe, op. cit. 29-32. [2] Ibid 29.

[3] "He said that if taxation and representation were to go hand in hand, then this country had an undoubted right to tax America, because she was represented in the British Parliament: she was represented by the members for the county of Kent, of which the thirteen provinces were a part and parcel; for in their charters they were to hold of the manor of Greenwich in Kent, of which manor they were by their charter to be parcel. This opinion raised a very loud laugh; but Sir James continued to support it," Parlt. Hist. xxii 1184. It is interesting to note that in 1621 the fact that Virginia was "anexed to the Crowne of England by the Tenure of East Greene-wich" was used as an argument for the proposition that it was subject to the legislative power of Parliament, Notestein, Commons Debates 1621 iv 256.

[4] Coote was admitted a member of Doctors' Commons in 1789, Coote, op. cit. 132.

[5] Ibid 125. [6] (1776) Hay and Mar. at pp. 5-21, 27-44.

[7] (1777) Hay and Mar. at pp. 96-120.

will of a sovereign." [1] In the same year he gave another well-reasoned opinion directed to prove that by the law of nations the operation of a treaty is not impaired by a change of dynasty or a revolution—the consequences of a contrary doctrine would, he said, be "a return to original barbarism." [2] These arguments and opinions illustrate both his learning and his powers as an advocate and a lawyer; and some sound law is laid down in some of his decisions as judge. He held that an enemy has no *persona standi in judicio;* [3] that the Prize court must always be fair to neutrals; [4] that, from the point of view of the Prize court, the important matter was not nationality but commercial domicile.[5] He gave a good description of the position of consuls in international law.[6] He laid down some useful rules of procedure both for the court of Admiralty and the Prize court, which, in 1802, were collected in a volume known as Marriott's *Formulare Instrumentorum.*[7] But some of his outbursts in court—for instance, his outbursts against the Americans,[8] and against the corrupting influence of the spirit of commerce; [9] some of his animadversions upon the application of an Act of 1787 [10] as to the import of lumber from America; [11] and his ridicule of such men as Grotius and Bynkershoek [12]—show that he was lamentably deficient in some of the most important qualities of a judge.

With his successor, Sir William Scott, Lord Stowell, a new period begins in the history of all the branches of the civilians' practice. He did much for all branches of that practice—something for ecclesiastical law, something for maritime law, but most of all for the system of British Prize law, of which he is generally acknowledged to be the creator.[13] But the history of his career and achievement belongs to the following century.

[1] Calendar of Home Office Papers 1760-1765 453-455; he pointed out also that, as by Act of Parliament the Crown had given to the captors its rights to prize, the court could not interfere, ibid 354.

[2] Ibid 467-469.

[3] The Père Adam (1778) Hay and Mar. 141.

[4] "That whenever the scales were even, a neutral was to have the turn in his favour," The La Prosperité (1778) Hay and Mar. at p. 167.

[5] The Postilion (1779) Hay and Mar. 245.

[6] The Jungfre Maria (1779) Hay and Mar. at p. 278.

[7] Roscoe, op. cit. 32; the book was compiled by an anonymous author and "perused and approved as correct" by Marriott; cp. the Concordia Affinitatis (1779) Hay and Mar. 289 for a ruling as to the sort of proof required from claimants in the Prize court.

[8] The Rebecca (1778) Hay and Mar. at pp. 207-210.

[9] The Anna Christiana (1778) Hay and Mar. at p. 163.

[10] 27 George III c. 7.

[11] The Columbus (1789) Collect. Juridica i 88-128, at pp. 102-103.

[12] The Reward (1778) Hay and Mar. at p. 224.

[13] Roscoe, op. cit. 35; to Stowell's successor, Dr. Lushington, is due the reform, the revival, and the development of the instance jurisdiction of the court, H. C. Coote, Practice of the Court of Admiralty, Preface; below 684 and n. 7.

The Place of the Learning and Practice of the Civilians in the English Legal System

I must in conclusion attempt to sum up very briefly the characteristics and contents of the branches of law which fell within the sphere of the civilians' learning and practice, and to indicate their place in the English legal system. This civilian learning and practice was regarded by the practitioners in the courts of law and equity as a recondite and rather mysterious subject, known only to the advocates and proctors of Doctors' Commons. There was some justification for this view. In the first place, we have seen that it was not till the end of the eighteenth century that reports of cases in the ecclesiastical courts and the court of Admiralty began to appear;[1] so that, apart from text books, which assumed a knowledge of the canon and civil law which few practitioners in the courts of common law and equity possessed, it was a traditional learning,[2] of somewhat the same esoteric character as that of the mediæval practitioners in the courts of common law in the days of the Year Books.[3] In the second place, the procedure of the ecclesiastical courts and the court of Admiralty, and therefore the technical environment in which the civilians administered their law, was very different from the procedure of the courts of common law and the court of Chancery, and therefore from the technical environment to which the practitioners in those courts were accustomed. These procedural differences, and the technical differences which resulted from them, were greater than those which separated the courts of common law from the court of Chancery. Therefore the bodies of law which were administered and developed in this different technical environment assumed a shape which was strange to the practitioners in the courts of law and equity.

But the civilians were an organized profession and a learned profession.[4] We have seen that the matters which fell within the jurisdiction of the courts in which they practised covered no inconsiderable field.[5] Though the jurisdiction of the ecclesiastical courts was not so extensive as it had been in the Middle Ages, it was still considerable;[6] and though the instance jurisdiction of the court of Admiralty had been crippled by the common law courts,[7] it still had an exclusive Prize jurisdiction.[8] We have seen that there was a considerable literature in English upon the various branches of the civilians' practice;[9] and there was a

[1] Above 105.
[2] E. S. Roscoe, Lord Stowell 34, cited above 106 n. 1.
[3] Vol. ii 541-542; cp. Holdsworth, Sources and Literature of English Law 89.
[4] Above 47, 50. [5] Above 51. [6] Vol. i 614-630.
[7] Ibid 557-558. [8] Ibid 564. [9] Above 606-646.

still more considerable continental literature upon many of the topics which fell within it.[1] It is not surprising, therefore, that the civilians were able to originate and develop bodies of doctrine upon the various topics, falling within the jurisdiction of their courts, which made a considerable and important contribution to the English legal system.

Moreover, the civilians helped, under the superintendence of the courts of common law and the court of Chancery, to define the relations of these bodies of doctrine both to common law and to equity. Just as, during the eighteenth century, the courts of common law and equity had learned to define their spheres of jurisdiction and to work in partnership with one another,[2] so, during this century, the ecclesiastical courts and the court of Admiralty had learned to work in partnership with the courts of law and equity. Blackstone said of the relations which existed in his day between the ecclesiastical courts and the courts of law and equity that, though the ecclesiastical courts

> continue to this day to decide many questions which are properly of temporal cognizance, yet justice is in general so ably and impartially administered in these tribunals (especially of the superior kind) and the boundaries of their power are now so well known and established, that no material inconvenience and fraud arises from this jurisdiction still continuing in the antient channel.[3]

And the same thing can be said of the jurisdiction of the court of Admiralty—the boundaries of its jurisdiction were well established and well known.

Let us look at the learning and practice of the civilians from these three points of view: first, the procedure of the ecclesiastical courts and the court of Admiralty, which gave to the bodies of law which originated there, their distinctive features; secondly, the contributions made by the civilians to the English legal system; and thirdly, the co-ordination of these bodies of law with the common law and equity.

(1) *The procedure of the ecclesiastical courts and the court of Admiralty.*

The procedure of the ecclesiastical courts, and the procedure of the court of Admiralty in civil cases, other than Prize cases, were based on the Roman civil and canon law. We have seen that in criminal cases which fell under the jurisdiction of the court of Admiralty, the procedure of the common law had, in

[1] For a list of continental books on procedure which the reports show were consulted by the civilians see Phillimore, Ecclesiastical Law (2nd ed.) ii 955 n. (*a*).

[2] Above 601-602.

[3] Comm. iii 98-99.

1536, been substituted for that of the civil law.[1] In outline the procedure of these courts was as follows : [2]

A suit was begun in the ecclesiastical courts by a citation or a decree [3] prepared by a proctor, and issued under the seal of the court. In the court of Admiralty, if the action was *in rem*, the court, after entry of the action, issued a warrant to arrest the *res :* [4] if the action was *in personam*, the court, after entry of the action, issued a monition.[5] The plaintiff then issued his libel [6] in which he stated the facts upon which he grounded his action, and, in positions and articles, the evidence on which he proposed to rely.[7] The libel is therefore somewhat analogous to the declaration at common law or to the bill in equity. Subsequent pleas were termed allegations. Before any libel or allegation was admitted, the opposite party could object to its admission in whole or in part ; and these objections were argued before and decided by the judge. This rule had its advantages. It tended to prevent redundancy and mistakes in the pleadings ; and it gave an opportunity of getting the opinion of the court in a summary way, and thus, in some cases, of avoiding the expense of an action. When the libel had been brought in, the plaintiff prayed that a day might be assigned for the defendant's answer ; and on the day assigned he requested the answer. The giving of the answer created the *litis contestatio*. The answer might affirm the cause of action, thus ending the suit ; or it might deny the whole libel ; or it might admit the facts but qualify them in such a way that they bore a wholly different construction. In civil cases the plaintiff was entitled to get the personal answer of the defendant on oath.[8] The parts of the libel not admitted by the defendant the plaintiff proved by witnesses.

The mode of taking the evidence of these witnesses was as follows : a notice, called a designation, was delivered to the

[1] Vol. i 550-551 ; 28 Henry VIII c. 15.

[2] Phillimore, Ecclesiastical Law (2nd ed.) ii 955 seqq, on which this account is chiefly based ; Langdale, Equity Pleading 19-26, and Essays in Anglo-American Legal History ii 753-778 ; Bl. Comm. iii 100-103 ; Report of the Commission on the Practice and Jurisdiction of the Ecclesiastical Courts, Parlt. Papers 1831-1832 xxiv, reprinted in 1856, pp. 14-26 ; for a good sketch of the Romano-canonical procedure on the Continent see Millar, History of Continental Civil Procedure (Continental Legal Hist. Series) 455-489.

[3] The citation was called a decree in the court of the Arches ; in testamentary causes the proceedings were sometimes begun by a caveat.

[4] Coote, Admiralty Practice (1st ed.) 12.

[5] Ibid 132.

[6] In criminal cases the first plea was called the articles, " because it runs in the name of the judge who articles and objects," Phillimore, op. cit. ii 960 ; in testamentary causes the first plea was called an allegation, ibid.

[7] Langdell, op. cit. 15, 19.

[8] Not in criminal cases, or in civil cases in which an offence was charged, e.g. the charge of adultery in a matrimonial suit, Phillimore, op. cit. ii 962 ; this rule dates from 13 Charles II St. 1 c. 12 § 4 ; Bl. Comm. iii 101.

defendant of their names, and the articles on which they were to be examined. Thus the defendant was informed of the points as to which he should cross-examine the witness, and of the matters which it would be necessary for him to explain by further pleadings. The witnesses were examined secretly by an examiner, and their answers were taken down in writing. The time given for this process of taking evidence was known as a probatory term, which might be extended if good causes were shown. When the plaintiff's witnesses had been examined and cross-examined, the defendant must plead. All pleadings subsequent to a libel were known as responsive allegations. The same rules as to hearing objections by the court as to the admissibility of the libel were applied to these allegations; and the same rules as to the necessity of an answer on oath, and as to the examination of the witnesses by which it was supported. A counter-allegation could be given in to the responsive allegation. Beyond this point the pleadings were rarely carried. When the parties renounced all further allegations, the evidence was published, and the cause was "concluded" as between them. All that remained was the hearing of the arguments of the advocates and the giving of a definitive sentence.[1] From that sentence there might be an appeal, which, in the last resort was to the High Court of Delegates.[2] Pending the appeal, the sentence was suspended; and the appellate court generally granted an inhibition to stay execution. An appeal might be made not only from a sentence, definitive or interlocutory, but also upon what was called a "grievance." A "grievance" was a wrong suffered by some irregular act of the judge, e.g. if he delayed sentence unduly, rejected evidence improperly, or unjustly excommunicated.

Just as arrest and imprisonment were the means by which the common law courts compelled the appearance of the defendant, or obedience to their judgment,[3] so excommunication was the ultimate means employed by the ecclesiastical courts. If within forty days the offender did not submit, a writ *de excommunicato capiendo*[4] issued to the sheriff, upon which he was imprisoned till he was reconciled to the church.[5] This aid lent by the common law to the ecclesiastical courts was, Blackstone thought, sufficient "to refute that groundless notion . . . that the courts of Westminster Hall are at open variance with those at Doctors' Commons."[6]

[1] As contrasted with an interlocutory sentence, which merely determined some matter arising in the course of litigation, Phillimore, op. cit. ii 966.

[2] Vol. i 604-605.

[3] Vol. viii 231-232; vol. ix 250-251; vol. xi 595-597.

[4] For which was substituted in 1813 the writ *de contumace capiendo*, vol. i 632.

[5] Ibid 630-631.

[6] Comm. iii 103.

This, in very bare outline, was the system of procedure and pleading in the ecclesiastical courts; and upon it the system of procedure and pleading in the court of Admiralty was based. Excommunication was of course no part of the process of the court of Admiralty—arrest of the *res* or the person was the sanction which it employed.[1] But, subject to this modification, the forms of procedure and pleading were very similar. We have seen that Clerke's book on the practice of the court of Admiralty assumes at many points that the rules of practice in that court were the same as the rules in the ecclesiastical courts;[2] and in the hearing of an ecclesiastical case reference was sometimes made to the practice of the court of Admiralty.[3] Like the systems of procedure and pleading in the courts of common law and the court of Chancery, it was a technical system, which led to delay and expense. We hear of a case in the court of Admiralty in which, owing to the fault of one or both of the parties, eight years elapsed between a sentence in, and the hearing of an appeal from, a vice-admiralty court in Nova Scotia.[4] The procedure in the ecclesiastical courts which must be followed to obtain an excommunication was complicated; and it was sometimes possible to get an excommunication rescinded if that procedure had not been followed.[5] The exclusion of *viva voce* evidence was unsatisfactory; and Thurlow, in *The Duchess of Kingston's Case*,[6] said that the way in which cross-examination was "managed upon paper" in the ecclesiastical courts was "imperfect and wretched." Nevertheless I think that it can be maintained that this system of procedure and pleading was free from many of the defects of the systems in force in the common law courts and the court of Chancery.

Like the system in force in the court of Chancery,[7] and unlike that in force in the courts of common law, proceedings were begun by one uniform method. The litigant was not obliged to choose at his peril the appropriate writ. In fact, in matrimonial and certain other suits for a particular kind of relief, a different form of relief might be given, if the facts proved showed that that different form of relief was due to one of the parties. Thus "a wife might sue for a restitution of conjugal rights, and the defence of the husband might be that she had been guilty of adultery; and if he succeeded the sentence could be a divorce *a mensa et thoro* against the

[1] Clerke, Praxis Suprema Curia Admiralitatis, Tit. 10.
[2] Above 629.
[3] See e.g. Martin v. Robinson (1757) 2 Lee at p. 398.
[4] Mascoll v. Scaife (1765) Burrell 3.
[5] Pytt v. Fendall and Jones (1752) 1 Lee 381.
[6] (1776) 20 S.T. at p. 557.
[7] Vol. ix 372.

wife." [1] At each stage in the proceedings the appropriateness and the regularity of the pleadings were submitted to the scrutiny of the court, and necessary amendments could be made to put the case in train for a regular hearing. In these two respects the procedure of the civilians was better than that of the common lawyers. It was better than that of the court of Chancery in three other respects. First, though there was no *viva voce* evidence, the manner in which that evidence was taken did allow for some sort of cross-examination, because the other party was apprised of the facts which each witness was called to prove.[2] Secondly, the pleadings in the suit were at every stage more strictly controlled by the court.[3] Thirdly, the judges had sufficient leisure to control the parties and their representatives, and showed themselves able and willing to do so.[4] They would refuse a commission to examine witnesses abroad if they saw that such a course would be useless.[5] They censured proctors who had delayed to examine their witnesses within their probatory terms.[6] They tried to effect a compromise if they could see that the result of going on would swallow up the property in costs.[7] Joseph Phillimore said, in his dedication to Lord Brougham of his edition of Lee's reports, that,

> from a careful examination of the abridgments of pleadings, and of the evidence, which occur in these manuscripts, it will appear that justice in that period was administered in the ecclesiastical courts purely and promptly, and, as compared with other courts, at a very moderate expense.[8]

That this view is correct is borne out by the report of the commissioners who reported on the ecclesiastical courts in 1832.[9] In their opinion there was no undue expense or delay in the hearing of cases in those courts. The mode of procedure, they said, and the nature of the causes, made it inevitable that considerable expense should be incurred; but the courts had been vigilant "to prevent and avoid unnecessary charges to the suitors." [10] As to delay, they found that many short causes were disposed of in a single term, and it hardly ever happened that a cause, ready for hearing at the end of a term, went over to the following term.[11]

[1] Phillimore, op. cit. ii 956; so too, "on application for a faculty to remove articles put into a church without a faculty, those who appear in opposition may pray in the same suit for a faculty to confirm," ibid.

[2] Above 680; for the Chancery procedure see vol. ix 353-358.

[3] Above 679; Langdell, Equity Pleading 46.

[4] For the absence of this control in the court of Chancery and its effects see vol. ix 373-374, 375.

[5] Dixon v. Ward (1767) Burrell 53.

[6] Henderson v. Beatty (1774) Burrell 133.

[7] Martin v. Robinson (1757) 2 Lee 397.

[8] 1 Lee vi-vii.

[9] Parlt. Papers 1831-1832 xxiv, reprint of 1856.

[10] At pp. 69-70.

[11] At p. 71.

Causes were concluded " as speedily as the practice of the courts, according to the form of proceedings at present established, would admit." [1]

The system of procedure followed by the court of Admiralty in the exercise of its Prize jurisdiction was quite different from that followed by it in the exercise of its instance jurisdiction. As Lord Mansfield said in the case of *Lindo v. Rodney*, " the whole system of litigation and jurisprudence in the Prize court is peculiar to itself : it is no more like the court of Admiralty than it is to any court in Westminster Hall." [2] It was regulated during the Commonwealth by a Prize Act of 1649,[3] and, after the Restoration, by rules made by the Privy Council in 1665 and 1672.[4] The validity of those rules was recognized by a statute of 1707 ; [5] and additions were made to them by eighteenth-century statutes.[6] Statutes of 1793 and 1803 gave the Crown power to make rules,[7] and other rules were made by the court,[8] sometimes with the help of the bar.[9] These rules were elucidated and explained by the judges of the court, notably by Lord Stowell. As thus elucidated and explained some of them were restated in the Naval Prize Act 1864 ; [10] and they were amended and codified in 1898.[11] The Prize rules of 1914 assimilated the procedure of the court, so far as possible, to the procedure of the other Divisions of the High Court. [12]

Long before 1914 the old procedure of the ecclesiastical courts and the court of Admiralty, like the old procedure of the common law courts and the court of Chancery, had been swept away. New rules of procedure were made in the course of the nineteenth century for the exercise of those parts of the jurisdiction of the ecclesiastical courts which still survived.[13] In 1854 the ecclesiastical

[1] At p. 71 ; it was also pointed out that " on the first day of each term, all causes in which no step has been taken to advance their progress in the preceding term, are publicly called by order of the court ; and unless satisfactory reason be assigned for the continuance of the proceeding, the suit is dismissed."

[2] (1773) 2 Dougl. at p. 614.

[3] E. S. Roscoe, History of the English Prize Court 29.

[4] Ibid 36-38 ; above 648.

[5] 6 Anne c. 37 §§ 4-8.

[6] 13 George II c. 4 ; 17 George II c. 34 ; 29 George II c. 34 ; 19 George III c. 67 ; 33 George III c. 66 ; 43 George III c. 160.

[7] Roscoe, op. cit. 39.

[8] These rules were collected in Marriott's Formulare Instrumentorum.

[9] Thus in the case of the Charles Havernerswerth (1748) cited in the Concordia Affinitatis (1779) Hay and Mar. at p. 291, " the court ordered fuller proof ; and the mode of making it to be settled and agreed by the advocates on all sides by reference —Dr. Paul, the King's advocate, Sir George Lee, Sir Ed. Simpson, Dr. Pinfold, Sir George Hay, Dr. Jenner, and the rest of the bar of civilians " ; it was said, ibid at p. 293, that it was not till 1748 that affidavits were admitted into the practice of the Admiralty court, and then only as *semiplena probatio*.

[10] 27, 28 Victoria c. 25 §§ 16-33.

[11] E. S. Roscoe, op. cit. 65-66.

[12] Ibid 68.

[13] See Phillimore, Ecclesiastical Law (2nd ed.) ii 998-1001, for a table of the ru es of procedure in force in the different ecclesiastical courts.

courts were given power to examine witnesses *viva voce*.[1] The Act of 1840,[2] which enlarged the jurisdiction of the court of Admiralty,[3] introduced some of the common law rules of procedure,[4] and gave the court power to make new rules.[5] The Acts of 1857, which transferred the matrimonial and testamentary business of the ecclesiastical courts to the new divorce court and court of probate, gave the court power to make new rules of procedure.[6] These rules, and the new Admiralty rules of 1859,[7] like the new rules made by the Common Law Procedure Act and Chancery Procedure Act of 1852,[8] were the transition stage between the old order and the new order introduced by the Judicature Act.

Thus the principal cause which had separated the branches of law administered by the civilians in their courts at Doctors' Commons from the branches of law administered in the courts of common law and the court of Chancery, disappeared; with its disappearance, Doctors' Commons itself was appropriately dissolved;[9] and the business which was once the preserve of the civilians was thrown open to the members of the common law and Chancery bars. But there are two respects in which the system of procedure and pleading evolved by the civilians has influenced the course of legal history. In the first place, ideas taken from this system, just as ideas taken from the old common law and Chancery systems of procedure and pleading,[10] have influenced the new system inaugurated by the Judicature Acts. Thus, as Phillimore has pointed out,[11] "the mode of pleading now in use in the High Court of Justice was modelled on that in use in the Admiralty court, which again was derived from that used in the ecclesiastical courts, though considerably condensed";[12] and the rule of practice, prevailing in the ecclesiastical courts, which sometimes allowed the courts to give the relief to which the parties were entitled, though the suit had been instituted for a different kind of relief,[13] helped to introduce the practice of allowing counter-claims in actions in the High

[1] 17, 18 Victoria c. 47. [2] 3, 4 Victoria c. 65. [3] §§ 4-6, 22.
[4] §§ 7, 10, 11, 13-15. [5] § 18.
[6] Probate—20, 21 Victoria c. 77 § 30, but subject to these rules the practice was to be that of the Prerogative court, § 29; Divorce—20, 21 Victoria c. 85 § 53.
[7] For these rules, which were made by Dr. Lushington and H. C. Rothery, see Coote, Admiralty Practice (1st ed.) vii, who says that they had, "whilst approximating the practice in Admiralty to the more elastic procedure of common law, preserved those original peculiarities of the court which were its excellencies and its boast."
[8] Vol. ix 375-376, 407. [9] Above 49.
[10] Vol. ix 328-330, 407. [11] Ecclesiastical Law (2nd ed.) ii 959 n. (*x*).
[12] The analogy between the precedent of a libel in the court of Admiralty in a cause of damage, as given in Marriott, Formulare Instrumentorum, 148-159, and a modern statement of claim, is striking.
[13] Above 681-682.

Court.[1] In the second place, just as our modern common law and our modern system of equity derive many of their characteristic features from the old systems of procedure in which and through which they were developed, so much of our modern law as to probate and administration, some of our modern law as to marriage, and much of our maritime and Prize law, derive many of their characteristic features from the system of procedure and pleading used by the civilians. The extent of this debt will appear when we have examined the nature of the contribution made by the civilians to the English legal system.

(2) *The contribution made by the civilians to the English legal system.*

In order to estimate the contribution made by the civilians to the English legal system we must look at the kind of cases which came before the ecclesiastical courts, the court of Admiralty, and the Prize court. It was in these three sets of courts that the foundations of some parts of our modern law upon very diverse topics were laid. Though these branches of law have been altered and developed by modern statutes, though they are now administered in different courts, and by means of a different system of procedure and pleading, many of their rules originate in the doctrines laid down by the civilians.

The ecclesiastical courts.

(i) *Matrimonial causes.*—In the eighteenth century the law as to the conditions under which a valid marriage could be celebrated was derived partly from the common law, partly from statutes, and partly from the ecclesiastical law.[2] Thus some of the causes which disabled persons from marrying were derived from the canon law, some from the common law, and some from the statute law; and we have seen that Lord Hardwicke's Marriage Act settled the forms requisite for a valid marriage.[3] It was chiefly disputes as to the existence of a marriage, suits to compel the celebration of a marriage, suits for the restitution of conjugal rights, nullity suits, and suits for divorce, which made up the list of matrimonial causes heard by the ecclesiastical courts.[4] Disputes as to the existence of a marriage were sometimes tried in a suit for jactitation of marriage—a form of suit which had become almost obsolete by the end of the eighteenth century.[5] Suits to compel the celebration of a marriage were

[1] Phillimore, Ecclesiastical Law (2nd ed.) ii 956.
[2] Bl. Comm. i 433-445; vol. i 621-624; for the principal statutes see vol. iv 490-492; vol. vi 410; vol. xi 609-610.
[3] 26 George II c. 33; vol. x 82; vol. xi 609.
[4] Bl. Comm. iii 93-95.
[5] Above 668 n. 3.

put an end to by Lord Hardwicke's Marriage Act.[1] In a suit for the restitution of conjugal rights the court could compel the parties to live together—"if," says Blackstone,[2] "either party be weak enough to desire it, contrary to the inclination of the other." Nullity suits were the only suits in which a divorce *a vinculo matrimonii* could be got. Such a suit lay when, in consequence of an impediment, e.g. consanguinity or the fact that one of the parties was already married, a marriage was *void ab initio*.[3] It also lay if there was a physical incapacity to consummate ;[4] but in this case there must have been a cohabitation for three years ;[5] and the marriage was voidable—that is, it subsisted till it was declared to be void by the court.[6] Suits for divorce *a mensa et thoro* lay if one of the parties were guilty of cruelty or adultery. But the suit would fail if there was collusion between the parties,[7] or if, in a case of adultery, the defendant pleaded and proved recrimination, i.e. if he or she could show that the plaintiff was equally guilty.[8] Similarly bad temper on the part of a wife might bar her suit for divorce on the ground of cruelty.[9] In a suit for divorce the court could decree alimony to an innocent wife ;[10] but before the decree was made, the court must always have evidence of the husband's means.[11] Enormous changes were made in the law as to matrimonial causes by the Act of 1857 ;[12] but some of the old law still remains ; for § 22 of the Act provides that,

> in all suits and proceedings other than suits and proceedings to dissolve a marriage, the court shall proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act.

(ii) *Testamentary causes.*—In the eighteenth century the wide jurisdiction, which the ecclesiastical courts had once had over wills and intestacies of personal property,[13] was considerably diminished. In the Middle Ages the common law courts

[1] Above 685.
[2] Comm. iii 94.
[3] Bl. Comm. i 440.
[4] Ibid iii 94.
[5] Aleson v. Aleson (1728) 2 Lee 576 ; Welde v. Welde (1730) 2 Lee 578.
[6] This distinction is implied in Dr. Pinfold's argument in Bird v. Bird (1753) 1 Lee at p. 211 ; for the modern rule see A. v. B (1868) L.R. 1 P. and D. at p. 562 ; in Bird v. Bird a *de facto* marriage being admitted, the husband was held liable for costs, though it was alleged that the marriage was void *ab initio*.
[7] See Baily v. Baily (1754) 1 Lee 536.
[8] Goodall v. Goodall (1757) 2 Lee 384—where recrimination was pleaded but not proved.
[9] "I was of opinion a wife was not entitled to a divorce for cruelty, unless it appeared she was a person of good temper, and had always behaved well and dutifully to her husband," Taylor v. Taylor (1755) 2 Lee at p. 173 *per* Sir George Lee.
[10] Bl. Comm. iii 94-95.
[11] Butler v. Butler (1752) 1 Lee 38.
[12] 20, 21 Victoria c. 85.
[13] Vol. i 625-630.

had assumed jurisdiction over such liabilities, contractual and delictual, of a deceased person, and over such of his choses in action, as survived his death.[1] In the seventeenth and eighteenth centuries the court of Chancery had assumed a general jurisdiction over the administration of the assets of a deceased person, and would make a decree for the administration of the estate at the suit of a creditor or a beneficiary.[2] But though much had been taken from the ecclesiastical courts, much was left. The exclusive jurisdiction which they possessed to make grants of probate of wills of personal property, and to make grants of administration in respect of that property, gave rise to many problems; and their solutions of those problems are the basis of a considerable amount of modern law.

Jurisdiction over the probate of wills made it necessary for the court to consider whether the document propounded as a will was a will, and whether it was the will of the deceased. The determination of these questions might give rise to many problems. It might involve a consideration of the question whether the will complied with the statutes, such as the Statute of Frauds [3] or the statutes as to seamen's wills,[4] which prescribed formal or material conditions for the validity of wills; whether the witnesses to these wills were disabled by interest; [5] whether a testator was competent; [6] whether he had been induced to make his will by fraud or undue influence; [7] whether a codicil could be proved without the will to which it was annexed; [8] whether a will had been revoked, or if revoked, had been revived.[9] It might also involve the question whether an executor had been duly appointed, expressly or by implication; [10] whether an executor had accepted office, and, if so, whether he could renounce; [11] whether, if he had renounced, his renunciation could be retracted; [12] what course should be pursued if he had been appointed for a limited period.[13] Jurisdiction over grants of administration in cases of total intestacy

[1] Vol. iii 576-585. [2] Vol. v 316-320; vol. vi 652-657; above 279.

[3] 29 Charles II c. 3 §§ 19-23; vol. vi 385.

[4] 9, 10 William III c. 41 § 6; as the result of this statute the courts held that wills of seamen made to secure a debt were void, see Moore v. Stevens (1753) 1 Lee 409; Keeling v. M'Egan (1754) ibid 607; Master v. Stone (1757) 2 Lee 339; this rule did not apply unless the testator at the time of the making of the will was a mariner, Ramsey v. Calcot (1756) 2 Lee 322.

[5] Lewis v. Bulkeley (1732-1733) 1 Lee 190 *note*.

[6] Spencer v. Hawkins (1752) 1 Lee 104.

[7] Lamkin v. Babb (1752) 1 Lee 1.

[8] In Miller v. Sheppard (1758) 2 Lee 506 it was held that this could not be done, since a codicil is part of the will.

[9] Helyar v. Helyar (1754) 1 Lee 472.

[10] Pickering and Towers v. Towers (1757) 2 Lee 401.

[11] Pytt v. Fendall (1753) 1 Lee 553.

[12] Hayward v. Dale (1756) 2 Lee 333.

[13] Bond v. Faikney (1757) 2 Lee 371.

made it necessary to consider which of the relatives of the deceased were entitled to a grant, and led to the evolution of rules of practice in making these grants.[1] Other rules were evolved when the deceased had left a will, and it was necessary to make a grant *cum testamento annexo ;* [2] or when it was necessary to make limited grants *de bonis non administratis*,[3] *durante minoritate*,[4] or *pendente lite ;* [5] or when the deceased had left no relatives and the Crown applied for a grant ; [6] or when a creditor applied.[7]

In making these grants of probate or administration the courts had established the difference between a grant in common form and a grant in solemn form. Where grants were not opposed, they were made, says Blackstone,[8]

> merely *ex officio et debito justitiae*, and are then the object of what is called the *voluntary*, and not the *contentious* jurisdiction. But when a *caveat* is entered against proving the will, or granting administration, and a suit thereupon follows to determine either the validity of the testament, or who hath a right to administer ; this claim and obstruction by the adverse party are an injury to the party entitled, and as such are remedied by the sentence of the spiritual court, either by establishing the will or granting the administration.

A will proved in solemn form could not be set aside unless it could be shown that the sentence had been got by fraud and collusion.[9]

The power of the ecclesiastical courts to call upon executors and administrators to account had been limited by the common law courts ; and the statute of Distribution had not succeeded in reviving these powers.[10] But it was still possible for them to compel the personal representative to exhibit an inventory at the suit of a creditor [11] or a beneficiary.[12] The inventory must be full and complete ; [13] and the court might have to consider whether the debt of a person who alleged that he was a creditor

[1] See e.g. Laud v. Browne (1752) 1 Lee 10 ; Stretch v. Pynn (1752) ibid 30 ; Pringle v. Brown (1752) ibid. 123 ; Girardot Buissieres v. Albert (1754) 2 Lee 51 ; Mercer v. Morland (1758) ibid 499.

[2] Bigg v. Keen (1752) 1 Lee 124 ; Thomas v. Baker (1753) ibid 341 ; Repington v. Holland (1755) 2 Lee 254.

[3] Cardale v. Harvey (1752) 1 Lee 177.

[4] Appleby v. Appleby (1752) 1 Lee 135.

[5] Stratton v. Ford (1754) 2 Lee 49.

[6] Stote v. Tyndall (1757) 2 Lee 394 ; cp. Drummond v. Hamilton (1753) 1 Lee 357.

[7] Carpenter v. Shelford (1758) 2 Lee 502.

[8] Comm. iii 98.

[9] " A legatee cannot set up a will after it has been litigated between the executor and next of kin, and pronounced against, unless he can shew the parties agreed to set aside the will by fraud or collusion," Bittleston v. Clark (1755) 2 Lee at p. 250.

[10] Vol. iii 560-561.

[11] Hughes v. Cook (1753) 1 Lee 386 ; Timbrell v. Rice (1753) ibid 471.

[12] Winchlow v. Smith (1754) 1 Lee 651.

[13] Watson v. Milward (1756) 2 Lee 332.

was enforceable at law.[1] It was held that the ecclesiastical court could take no cognizance of the statute of limitations, because that statute was only pleadable to a common law action for a debt. Such a debt, therefore, could be inserted in the inventory.[2] This rule applied in the ecclesiastical courts may have helped to establish the rule, laid down earlier by Lord Hardwicke, that an executor can pay a statute-barred debt.[3] But the court had no jurisdiction at the suit of a creditor, to examine the particulars of the statements inserted in the inventory, since the court had no jurisdiction to determine matters of account.[4] This limitation of the court's power shows that the taking of the inventory was no security for the regular administration of the estate. Similarly, though the court could, down to 1857,[5] entertain suits for legacies and for the distribution of the residuary estate, it very rarely did so.[6] In this matter, as in all matters relating to accounts as between the different claimants to the estate, the superior remedies given by the court of Chancery were rapidly rendering obsolete this branch of the testamentary jurisdiction of the ecclesiastical courts.[7]

But much of the law created by the other branches of their testamentary jurisdiction, though altered by such statutes as the Wills Act 1837[8] and by other statutes of the nineteenth century, and though its administration is entrusted to a different court, still survives. The Act of 1857, which created the new court of Probate, provided that it should have the same powers as those possessed by the archbishop of Canterbury's Prerogative court; and that the duties imposed on the Prerogative court or on the bishops in reference to their testamentary jurisdiction should be imposed upon it.[9] Necessarily it exercised those powers and duties upon the same principles as those which had been evolved and applied by the courts which it superseded.

(iii) *Purely ecclesiastical causes.*—These causes comprised a miscellaneous mass of very different kinds of cases, over which the ecclesiastical courts still retained jurisdiction, in spite of the

[1] In Baron Von Solendahl v. Hampe (1752) 1 Lee 102 it was held that as by the civil law a physician could not sue for his fees, he could not call for an inventory.

[2] Philipson v. Harvey (1757) 2 Lee 344.

[3] Norton v. Frecker (1737) 1 Atk. at p. 526.

[4] "I was of opinion that a creditor has a right only to a constat of the estate by an inventory, but that I had no jurisdiction at the instance of a creditor to examine the particulars of the account," Brown v. Atkins (1754) 2 Lee at p. 2.

[5] 20, 21 Victoria c. 77 § 23; vol. i 629-630.

[6] For an illustration of such a case see Rumsey v. Tizard (1754) 1 Lee 537; cp. Harrison v. Rhodes (1753) ibid. 197—a decision as to when interest on a legacy was payable.

[7] Bl. Comm. iii 98; the court of Chancery took over some of the rules applied by the ecclesiastical courts to legacies—it followed the ecclesiastical law in this matter, as in other matters it followed the common law, above 225, 279.

[8] 7 William IV and 1 Victoria c. 26. [9] 20, 21 Victoria c. 77 § 23.

attacks made upon that jurisdiction by the common law courts, and in spite of its curtailment by the Legislature.[1] They consisted of what Blackstone has called "pecuniary causes," [2] i.e. causes which arose out of the withholding of ecclesiastical dues, or from some act or neglect relating to the church which caused damage to the plaintiff; of causes relating to the fabric or furnishing of the church; of causes relating to the powers, appointments, and conduct of ecclesiastical officials; and of causes relating to offences against ecclesiastical law.

Pecuniary causes cover the most ground. They included cases relating to the subtraction of tithes from a parson or a lay impropriator, provided that the title to the tithes was not disputed. Any question as to title, or any question as to the existence of a custom or modus, was decided by the common law courts or the court of Chancery.[3] But, even as thus limited, this jurisdiction gave rise to a number of cases in the ecclesiastical courts. Thus, where a custom or modus was not proved, the court had no difficulty in giving judgment for a claim made by a parson for less than the amount due to him by common right.[4] The court might decide on such points as the sufficiency of a tender made of the tithes,[5] or the manner in which the tithe owner could carry away his tithes.[6] Other causes were the non-payment of such dues "as pensions, mortuaries, compositions, offerings, and whatsoever falls under the denomination of surplice fees, for marriages or other ministerial offices of the church." [7] But it was a rule both of the common law [8] and of the ecclesiastical law,[9] that no surplice fee was payable to a clergyman who had not performed the service for which the fee was charged. Other causes were causes of spoliation, i.e. where one parson took the fruits of another's benefice without title, provided that the right of patronage was not disputed; [10] or dilapidations, which might be either voluntary or permissive.[11] Churchwardens could impose a church rate for the repair of the church; and the non-payment of such a rate could be made the subject of a suit,[12] which might raise questions as to the justice of the assessment,[13] or as to the amount which could legally be levied.[14]

Causes relating to the fabric or furnishing of the church

[1] Vol. i 618, 620-621, 628, 629, 630.
[2] Comm. iii 88.
[3] Ibid 88-89.
[4] Harry v. Littleton (1753) 1 Lee 201.
[5] Stevens v. Webb (1753) 1 Lee 456.
[6] Rees v. Harris (1754) 2 Lee 18.
[7] Bl. Comm. iii 89.
[8] Ibid 90.
[9] Patten v. Castleman (1753) 1 Lee 387; officials of the ecclesiastical courts could sue for their fees in those courts, but not if their title to the fees was in dispute, Bl. Comm. iii 90.
[10] Ibid 90-91.
[11] Ibid. 91-92.
[12] Ibid 92.
[13] Lilly v. Hardy (1752) 1 Lee 52.
[14] Brettell v. Wilmot (1758) 2 Lee 548.

were causes in which authority was sought for a faculty to take down or erect something in a church, such as a monument, a pew, or an organ.[1] In the case of an application for a faculty to appropriate a pew, the court must consider whether the grant would prejudice the parish, whether it would prejudice the opposers, and whether the applicant was qualified by his rank and property.[2] The court could also decide which of two claimants was entitled to seats in a particular pew.[3]

In some cases the court could decide questions as to the powers, appointment, and conduct of ecclesiastical officials. Thus it decided questions as to the jurisdiction of a bishop's chancellor,[4] as to the right of patrons to controvert the election of churchwardens,[5] as to the deprivation of a parish clerk for misconduct.[6] Such a clerk, it was held, was, if nominated by the parson, a spiritual officer and therefore subject to the ecclesiastical court; but he was a temporal officer if he were nominated by the parishioners, and therefore presumably not subject to its jurisdiction.[7]

The courts still tried many miscellaneous offences committed both by the laity and the clergy against the ecclesiastical law. Brawling in church;[8] indecent and irreverent behaviour in church;[9] defamation, whether written or spoken, if the words were not actionable at law;[10] immorality;[11] moral offences[12] or neglect of their duties[13] by clergymen.

In the nineteenth century the ecclesiastical courts were deprived of their jurisdiction over some of these causes. They were deprived of their jurisdiction over tithes,[14] over perjury, over brawling in church, and over defamation.[15] Compulsory church rates have been abolished;[16] and their jurisdiction over the conduct of the laity is obsolete.[17] New statutory courts have provided a more effective procedure for dealing with clerical misbehaviour—moral or doctrinal.[18] But some small part of this jurisdiction still survives either to the old, or to the newer statutory courts;[19] and, if such cases are reported, they are

[1] Hopper v. Davis (1754) 1 Lee 640; Randall v. Collins (1755) 2 Lee 217.
[2] Partington v. Rector of Barnes (1757) 2 Lee 345.
[3] Wilkinson v. Moss (1756) 2 Lee 259.
[4] Hillyer v. Milligan (1754) 2 Lee 8; Smith v. Lovegrove (1755) 2 Lee 162.
[5] Governors of St. Thomas' Hospital v. Trehorne (1752) 1 Lee 126.
[6] Barton v. Ashton (1753) 1 Lee 350. [7] At pp. 353-354.
[8] Foote v. Richards (1753) 1 Lee 265; Huett v. Dash (1758) 2 Lee 511.
[9] Lloyd v. Owen (1753) 1 Lee 434.
[10] Ware v. Johnson (1755) 2 Lee 103; vol. iii 410; vol. v 205; vol. viii 335.
[11] Wheatley v. Fowler (1757) 2 Lee 376.
[12] Pawlet v. Head (1728) 2 Lee 565; Rowland v. Jones (1755) ibid 191.
[13] Argar v. Holdsworth (1758) 2 Lee 515.
[14] Phillimore, Ecclesiastical Law (2nd ed.) ii 1162.
[15] Vol. i 620. [16] 31, 32 Victoria c. 109. [17] Vol. i 621.
[18] Ibid 611-614. [19] Ibid 630.

appropriately grouped with the reports of the Probate Divorce and Admiralty Division of the High Court, for they resemble the cases appropriated to that Division, in that they once, like them, formed part of the civilians' practice.

The court of Admiralty.

At the end of the seventeenth century the common lawyers had succeeded in drastically limiting the jurisdiction of the court of Admiralty ; [1] and, right down to the beginning of the nineteenth century, its business was small.[2] It was said in 1802 that its jurisdiction was " confined in matters of contract, to suits for seamen's wages, or those on hypothecations ; in matters of tort to actions for assault, collision, or spoil ; and in quasi-contracts to actions by part owners for security, and actions of salvage." [3] This statement is borne out by the scanty reports of Admiralty cases in the eighteenth century. There are a considerable number of actions by seamen for their wages, in which there are discussions on such matters as the right of the master to an apprentice's wages [4] and wrongful dismissal,[5] the consequences of the loss or destruction of the ship,[6] and whether the sailors on the latest or a previous voyage had the prior claim against the ship.[7] There are a number of cases of collision in which the rules applicable when both,[8] neither,[9] or one [10] of the ships were in fault, are discussed. In 1767 Sir James Marriott, the King's advocate, reported that " the proportion that the salvage dues bear to the value of cargoes is not fixed, but the law of the Admiralty (which is the general maritime law of all Europe) rates it according to the circumstances of distress and danger attending the saving." [11] There are one or two cases in which the rights of persons who had lent on bottomry are decided ; [12] and one or two cases of disputes between co-owners,[13] and a case

[1] Vol. i 557-558.

[2] " When some half century ago the court came to be presided over by Lord Stowell, such was the paucity of its legal business, that it could be said to afford that great legal luminary little else than an occasional morning's occupation," Coote, Admiralty Practice (1st ed.) Pref.

[3] Browne, Civil Law ii 122, cited E. S. Roscoe, Admiralty Practice (4th ed.) 5 n. (*i*).

[4] Clarke v. Royal Duke (1766) Burrell 17.

[5] Davis v. Rotch (1766) ibid 20.

[6] Bennet v. Buggin (1766) ibid 24 ; Cutler v. Wright (1712) ibid 299.

[7] Young v. Lawrence (1705) ibid 288.

[8] Harper v. Gravenor (1677) ibid 251 ; Beckham v. Chapman (1695) ibid 270 ; Wildman v. Blakes (1789) ibid 332.

[9] Baker v. Malin (1764) ibid 322.

[10] Newman v. Croft (1679) ibid 254 ; Stringer v. Browne (1696) ibid 275.

[11] Calendar of Home Office Papers 1766-1769, 185.

[12] Day v. Wolfe (1768) Burrell 88 ; Mackensie v. Ogilvie (1774) ibid 134.

[13] Meeke v. The Lord Holland (1774) Burrell 145 ; cp. cases cited in Adams v. Crouch (1771) ibid at p. 118.

of a dispute between the co-owners and a master.[1] Ransom contracts [2] had been enforced in the court of Admiralty from the middle of the sixteenth century.[3] We have seen that it was not till the eighteenth century that the common law courts assumed jurisdiction over them ; [4] and to the end the court of Admiralty exercised a concurrent jurisdiction. In these cases the hostage had a right of action *in rem* against the ship and cargo.[5] Proceedings against smugglers [6] gave rise to a small amount of litigation. It was not till 1840, when the Legislature restored to the court some part of the jurisdiction of which it had been deprived by the common law courts,[7] that its business revived.[8] It was not till then that it was able to construct, on the basis of Roman law and the maritime law of Europe, our modern English system of maritime law.[9]

The Prize court.

During the eighteenth century, decisions of the Prize court had begun to lay down some of the principles of Prize law. It was settled that the court administered international law,[10] and that it must hold the scale fairly between neutrals and belligerents.[11] Some rules had been laid down as to the liability to capture of enemy goods on neutral ships,[12] and neutral goods on enemy ships ; [13] and as to the effect of a sentence of condemnation.[14] In some arguments [15] and opinions [16] the interpretation of treaties which varied the general rules of international law is considered. There were some decisions as to what goods were contraband,[17] and as to the rights of the parties in the case of a joint capture.[18] Other cases applied the doctrine of continuous voyage ; [19] and there was a line of cases which held that the Crown could requisition naval stores belonging to a neutral, paying the neutral a fair price for them.[20] There were cases which

[1] Adams v. Crouch (1771) Burrell 110.
[2] Above 534.
[3] Senior, Ransom Bills, L.Q.R. xxxiv 51.
[4] Above 534-535.
[5] For some cases of the seventeenth and eighteenth centuries see L.Q.R. xxxiv 53.
[6] Brown v. Kenyon (1767) Burrell 30.
[7] 3, 4 Victoria c. 65 §§ 4-6.
[8] Coote, Admiralty Practice (1st ed.) Pref.
[9] Vol. i 559.
[10] Above 651-652, 653 ; vol. i 565.
[11] Above 654.
[12] Burrell 356-357—opinion of Dr. Paul.
[13] La Felicite (1757) Burrell 175.
[14] The Constantia (1760) ibid at p. 210.
[15] The Hendric and Alida (1777) Hay and Mar. at p. 121 *per* Dr. Harris *arg.* ; but the judge seemed to think that this matter was a matter for the Privy Council, ibid at p. 138 ; above 653 n. 5.
[16] Opinion of Lee in 1746, Burrell 401 ; of Hay in 1762, ibid 382.
[17] Die Vier Gebroeders (1759) Burrell 159 ; the St. Jacob (1759) ibid 160.
[18] The Augusta and other ships (1758) ibid 167.
[19] The Yong Vrow Adriana (1764) ibid 178, at p. 180.
[20] E.g. The Vrow Antoinette (1778) Hay and Mar. 142 ; De Yong Joslers (1778) ibid 148.

considered, sometimes at some length, whether a captured ship was a droit of the Crown which passed to the captor under the Crown's grant, or a droit of the Admiralty which did not so pass.[1] We have seen that Leoline Jenkins had laid down modern rules as to a belligerent's duty to neutrals, as to neutral rights, and as to the burden of proof in prize cases ; and that he had foreshadowed the doctrine of continuous voyage.[2] But since these decisions were not reported, their principles were not continuously developed, so that, as Mr. Roscoe has said, the law before Lord Stowell was still in a chaotic condition.[3] With Lord Stowell, and his work in creating the system of British Prize law, I shall speak in a subsequent chapter. Here it will be sufficient to say that it was under his guidance that the civilians made, in the creation of this system of Prize law, one of their largest contributions to English law, and a very considerable contribution to the jurisprudence of the world.

This summary description of the bodies of law which have been created by these three different sets of courts, which were staffed by civilian judges, and before which civilian advocates practised, shows that these courts have made a very considerable contribution to the English legal system. These bodies of law are now, for the most part, administered by the High Court, by practitioners who are members of the English bar, and by means of rules of procedure very different from those used by the civilians. But just as the rules of equity are still very distinct from the rules of the common law,[4] so these three bodies of law are still very distinct from the rules both of law and equity. And in both cases the reason for their distinctive character is the same. In both cases the long period in which they were evolved by separate courts, by means of separate systems of procedure, and therefore in very different technical atmospheres, have produced fundamental differences, which the framers of the Judicature Act wisely did not attempt to abolish.[5] But as it was with the system of equity, so it was with these three bodies of law which once formed a part of the civilians' practice —the framers of the Judicature Act found it possible to entrust their administration to a single High Court, acting by means of an almost uniform code of procedure. We have seen that this measure of fusion of the rules of law and equity had been made possible by the manner in which, during the eighteenth century, law and equity had learned to work together in partnership.[6]

[1] See e.g. The Dickinson (1776) Hay and Mar. 1 ; Roscoe, Life of Stowell 30, 32 ; vol. i 559-561 ; above 655, 674.
[2] Above 654-656. [3] Life of Lord Stowell 35.
[4] Above 604-605. [5] Above 603. [6] Above 601-602.

We shall now see that it was for the same reason that this same measure of fusion between the bodies of law which fell within the sphere of the civilians' practice, and the rules of law and equity, was able to be effected.

(3) *The co-ordination of these bodies of law with the common law and equity.*

The fact that various parts of English law were administered by separate sets of courts, acting by means of different rules of procedure, and developing the law under the influence of different technical principles, often caused serious inconveniences to litigants. In the first place, it made the administration of justice slow and costly. In the second place, it produced striking legal anomalies. Let us look at one or two illustrations of these inconveniences.

(i) The administration of justice was made slow and costly, either by reason of the uncertainty of the boundaries of the jurisdiction of these various courts, or by reason of the opportunities for causing expense and delay which it gave to unscrupulous litigants. The first of these consequences is illustrated by the case of *Andrews v. Powys* [1] which, between the years 1721 and 1728, came before the Prerogative court, the High Court of Delegates, the court of Chancery, the House of Lords, and back to the High Court of Delegates. A testator had left two wills. In the earlier will he had appointed the defendant Powys, who was his nephew, his executor, and left him the residue of his property. In the later will he had appointed the plaintiff Andrews his executor, and left the residue of his property to Andrews' children. Immediately after the testator's death, Andrews, without communicating with the relatives, took probate in common form. Powys got this probate recalled, and an order that Andrews should pay £1000, part of the estate collected by him, into court. The Delegates reversed the order to pay the money into court on the ground that the judge of the Prerogative court had no power to make it. Powys then filed a bill in Chancery to discover by what means the later will was obtained, and whether the testator was then capable of making a will. Andrews demurred to the bill on the ground that the capacity or incapacity of a testator was a matter for the ecclesiastical court. Lord Macclesfield, L.C., overruled this demurrer, and ordered Andrews to pay the money into

[1] 2 Brown P.C. 504 ; 1 Lee 242 ; the report in 2 Brown of the case in the House of Lords gives the clearest statement of the facts ; the report in 1 Lee (*sub. nom.* Andrews v. Powis) is of the final hearing of the case before the Delegates : the statement of facts leading up to the decision is not so accurate as that in 2 Brown P.C. but it supplements it at one or two points.

court. The House of Lords upheld this decision, but Lords Harcourt and Trevor held that the Delegates were mistaken in thinking that the judge of the Prerogative court could not order money to be paid into court. The Delegates then made the order to pay money into court; and, after a hearing which lasted seventeen days, they found in favour of the first will. The court of Chancery then ordered the money paid into that court to be paid out to Powys. This case illustrates, not only the delay and expense caused by uncertainties as to the boundaries of the jurisdiction of these separate courts, but also the opportunities which they gave to unscrupulous litigants. Other cases show that they took advantage of their opportunities. We hear of a case in which a legatee first filed a bill in Chancery against an executor for discovery, then sued for an inventory in the ecclesiastical court, and then revived her bill in Chancery.[1] The Prerogative court tried to prevent this abuse by holding that if a plaintiff had chosen to proceed in Chancery, he could not also proceed there.[2] But there was nothing to prevent one creditor from suing in Chancery for an account, and another suing in the Prerogative court for an inventory.[3]

(ii) The most anomalous result of the different jurisdictions of the courts of common law, the court of Chancery, and the ecclesiastical courts, was that a will pronounced to be invalid by one jurisdiction might be held to be valid by another. A jury might find that a will devising real property was a forgery, and the Prerogative court might find that the same will was a valid will of personal estate. Lord Hardwicke said:[4]

> I have often thought it a very great absurdity that a will which consists both of real and personal estate, notwithstanding it has been set aside at law for the insanity of the testator, shall still be litigated upon paper depositions only in the ecclesiastical court because they have a jurisdiction on account of the personal estate disposed of by it. I wish gentlemen of abilities would take this inconvenience and absurdity into their consideration, and find out a proper remedy by the assistance of the Legislature. But as the law stands at present it is not in the power of this court to interpose so as to stop the proceedings in the ecclesiastical court.

The court of Chancery could not set aside a will of personal property by reason of a fraud practised on a testator, because that was a matter which fell within the jurisdiction of the ecclesiastical court[5]—though it might interfere to help the next

[1] Radcliff v. Venfield (1753) 1 Lee 272.
[2] Pearson v. Gamon (1756) 2 Lee 268.
[3] Lloyd v. Beatniffe (1726) 2 Lee 561.
[4] Montgomery v. Clark (1742) 2 Atk. at p. 379; cp. Barnesly v. Powel (1749) 1 Ves. Sen. at p. 287.
[5] Barnesly v. Powel (1749) 1 Ves. Sen. 287.

of kin if probate had been got by a fraud upon them,[1] either by declaring that the person guilty of the fraud was a trustee, or by ordering him to consent to a revocation of probate;[2] and, as a court of construction, it might declare a beneficiary under the will to be a trustee.[3] These rules were not finally settled till the middle of the nineteenth century;[4] and the reports make it clear that many other points gave rise to doubts and conflicts. Thus the ecclesiastical courts and the court of Chancery did not see eye to eye as to their power to appoint guardians;[5] and, in at least one case, there was an attempt to induce the court of King's Bench to issue a writ of mandamus, which would have interfered with the discretion of the ecclesiastical court to make a grant of administration.[6]

But though serious inconveniences were caused by the conflicting jurisdictions of the common law courts, the court of Chancery, the ecclesiastical courts, and the court of Admiralty, considerable progress was made during the eighteenth century in the work of settling the boundaries of the jurisdictions of these courts, and therefore in co-ordinating the bodies of law which they administered. This work of co-ordination was effected by means of decisions as to when a writ of prohibition or an injunction could or could not be obtained to stop the exercise of jurisdiction by the ecclesiastical courts or the court of Admiralty. It was by means of decisions as to the ambit of these two remedies, that the bodies of law which came within the sphere of the civilians' practice, were co-ordinated with the common law and with equity.

In principle the scope of the two remedies was different. A writ of prohibition lay if the court had no jurisdiction. It involved a decision as to the ambit of the court's jurisdiction; and a judge who proceeded in spite of a prohibition broke the

[1] "There is a material difference between this court's taking on them to set aside a will of personal estate on account of fraud or forgery in obtaining or making that will, and taking from the party the benefit of a will established in the ecclesiastical court by his fraud, not upon the testator, but upon the person disinherited thereby, and claiming after the testator's death against it," Barnesly v. Powel (1749) 1 Ves. Sen. 287.

[2] Ibid at p. 289; cp. Williams, Executors (12th ed.) 385.

[3] The best exposition of the principle upon which this rule rests, and of the reason underlying the various cases to which it has given rise is Lord Sumner's statement in Blackwell v. Blackwell [1929] A.C. at pp. 334-335.

[4] See Allan v. M'Pherson (1847) 1 H.L.C. 191.

[5] In the case of Brotherton v. Hellier (1755) 2 Lee at p. 135 Sir George Lee said that "the court had a right by law to appoint guardians for a person and estate as well as the Chancery"; but in the case of Buck v. Draper (1746) 3 Atk. 631 Lord Hardwicke said that, "he was surprised upon what pretence the ecclesiastical courts in the country take upon *them to appoint* guardians *ex officio*, without any suit instituted for that purpose, and by this means break in upon the jurisdiction of this court"; and he hinted at the possibility of a writ of *quo warranto* addressed to these courts.

[6] R. v. Simpson (1764) 3 Burr. 1463—the case ended in a compromise.

law, and was guilty of a contempt of the court of King's Bench. The issue of an injunction did not necessarily involve any decision as to the ambit of the court's jurisdiction.[1] It was a remedy given by a court of equity which acted *in personam*. The court of Chancery "supposes the ecclesiastical court to have jurisdiction, but does not think proper, from some collateral circumstances, to suffer the party to apply, and take the benefit of that jurisdiction."[2] Necessarily the working out of this principle gave rise to some detailed rules which modified the principle upon which the difference between the scope of the two remedies was originally based. Thus, distinctions were drawn between cases where a prohibition could be got after sentence in the inferior court, and where it could only be got if applied for before sentence,[3] which were not perhaps quite consistent with the principle that all exercises of jurisdiction which could be prohibited were breaches of the law; and it was obvious that some cases in which injunctions were issued to the ecclesiastical courts, did not suppose that they had jurisdiction, but were based upon the fact that the court of Chancery had assumed an exclusive or a concurrent jurisdiction.[4] All the decisions were not strictly logical. It was necessary sometimes to sacrifice logic to expediency. But it was by means of these decisions that a settlement was effected of the spheres within which these courts exercised their jurisdiction, and therefore a co-ordination of the bodies of law which they were creating and administering.

In the following cases it was settled that the common law courts had jurisdiction, and that therefore a writ of prohibition could be got if the ecclesiastical courts or the court of Admiralty attempted to exercise it.

The common law courts had jurisdiction in cases where the question at issue was whether a person had a title to property, such as tithes, which the common law regarded as real property; and therefore over the question whether there was a modus, or a custom or prescription, which affected the incidents of that property.[5] In these cases the court of Chancery had a concurrent jurisdiction. They also had jurisdiction in cases where the

[1] Sheffield v. Duchess of Buckinghamshire (1739) 1 Atk. at pp. 630-631 *per* Lord Hardwicke.

[2] Ibid. [3] Full v. Hutchins (1776) 2 Cowper at pp. 424-425.

[4] E.g. in the case of its jurisdiction over legacies, see Bl. Comm. iii 98.

[5] Ibid 88-89; Patten v. Castleman (1753) 1 Lee at p. 394; the same principle applied when the question at issue was the title to personal property, e.g. the title to a share in a ship, see Meeke v. The Lord Holland (1774) Burrell at p. 152, where Sir George Hay said, "we can no more entrench on their province than they will on ours. When a right of ownership is in question, this court will not enquire into it, because it is admitted to be under discussion in Chancery. Many proceedings were formerly had in respect to owners which have not been adopted of late years."

question at issue was whether or not there were debts owing to or by the estate of a deceased person.[1] In these cases too the court of Chancery had a concurrent jurisdiction. Cases where the question at issue was whether a criminal offence had been committed in England in breach of a statute, were matters for the common law courts. Neither the ecclesiastical courts [2] nor the court of Admiralty,[3] nor the Prize court [4] could interfere unless the statute had conferred jurisdiction upon them. But, though crimes committed on a river below bridges fell within the jurisdiction of the common law courts, damage done by one ship to another below bridges fell within the jurisdiction of the court of Admiralty.[5] Though, as a general rule, the court of Admiralty had jurisdiction to enforce the payment of wages due to seamen,[6] it had no jurisdiction if there was a contract under seal to pay the wages.[7] And it should be noted that, if a court of common law had laid down a general principle which was applicable to a matter coming within the jurisdiction of an inferior court, that court could be prohibited if it did not follow it. Thus the common law courts had laid it down that a custom to pay fees in cases where no service was done was an unreasonable custom. Sir George Lee followed this principle when he held that a vicar could not claim a wedding fee when one of his parishioners had been married in another parish, though, he said, he had not found any decision on this particular case.[8]

In the following cases it was held that the court of Chancery had jurisdiction, and that therefore an injunction could be got if the ecclesiastical courts or the court of Admiralty attempted to exercise it.

All questions which involved a decision upon the construction of a will were matters for the court of Chancery, e.g. the question whether an executor took beneficially or whether he took as a trustee for the next of kin,[9] or the question whether or not a prior will, which had been revoked by a later will, could operate as a marriage settlement.[10] The court of Chancery also assumed jurisdiction in all cases where a trust had been created ; [11] in all

[1] Morris v. Darling (1755) 2 Lee 175.
[2] Cox v. Ricraft (1757) 2 Lee at p. 375.
[3] Wynne, Life of Jenkins ii 747-748 ; above 658.
[4] The Snow Greyhound (1763) Burrell 189.
[5] Fairless v. Thorsen (1774) Burrell 130.
[6] Above 692.
[7] Howe v. Nappier (1766) 4 Burr. 1944.
[8] Patten v. Castleman (1753) 1 Lee at pp. 394-397 ; after the sentence a case was produced precisely in point, ibid at p. 398.
[9] Sutton v. Smith (1753) 1 Lee at pp. 280-281.
[10] Pohlman v. Untzellman (1756) 2 Lee 319.
[11] Anon. (1738) 1 Atk. 491 ; Sir George Lee gave an opinion in 1745 that questions of account as between the managers of a fund to carry on a privateering venture, and the subscribers to the fund, fell within the jurisdiction, not of the court of Admiralty, but of the court of Chancery, Burrell 381.

cases where the question at issue was whether some act, e.g. a release given by a beneficiary, had been procured by fraud ; [1] and in all cases in which it was necessary to consider the allowance which ought to be made for the maintenance and education of infants.[2] Over suits for the enforcement of legacies the ecclesiastical courts and the court of Chancery had a concurrent jurisdiction, unless there was a trust, in which case the jurisdiction of the court of Chancery was exclusive.[3] The court of Admiralty could adjust the claims of the part owners of a ship ; but the court of Chancery had jurisdiction to settle which of two rival claimants to a share in a ship had the better title.[4]

These cases show that the limits of the jurisdiction of these separate courts were being settled. As the result of this settlement the old rivalry between them was ceasing, they were beginning to work together as partners, and thus a co-ordination of the different bodies of law which they administered was made possible. This process of co-ordination was helped by the fact that common lawyers were very occasionally heard in the court of Admiralty, and by the fact that civilians were sometimes heard in the courts of common law and in the court of Chancery. I have only found one reported case in which the judge of the court of Admiralty heard an argument by common lawyers ; [5] but common law judges generally formed part of the High Court of Delegates which heard appeals in testamentary and matrimonial causes,[6] so that they were not wholly ignorant of the law upon those matters. On the other hand, there are several cases in which civilians were heard in the common law courts. In the case of *Middleton v. Crofts* Dr. Andrews was heard, on the question whether a rule for a writ of prohibition should be made absolute, in a case where a man and a woman were prosecuted in an ecclesiastical court for having got married in a private house, in uncanonical hours, and without licence or banns.[7] In the case of *R. v. Simpson* [8] Dr. Collier " in consequence of a rule of ' leave for a civilian to attend ' shewed cause against a rule " for a mandamus to the Prerogative court ; in the case of *Howe v. Nappier* [9] Dr. Marriott showed cause against a prohibition in a suit for seamen's wages ; and in *The Duchess of Kingston's Case* [10] two civilians—Drs. Calvert and Wynne—argued for the Duchess,[11] and

[1] Millington v. Sorsby (1754) 1 Lee at p. 526.
[2] Fleet v. Holmes (1755) 2 Lee 140.
[3] Anon. (1738) 1 Atk. 491.
[4] Meeke v. The Lord Holland (1774) Burrell at p. 152, above 698 n. 5.
[5] Elliott v. Lister (1756) Burrell at p. 321.
[6] See e.g. Andrews v. Powis (1728) 1 Lee 242—a testamentary cause in which Page and Reynolds JJ. and Hale B. were members of the court ; Hervey v. Hervey (1773) 2 W. Bl. 877—a matrimonial case in which Smythe C.B. and Willes and Blackstone JJ. were members of the court.
[7] (1736) 2 Atk. 650 at p. 670.
[8] (1764) 3 Burr. at p. 1463.
[9] (1766) 4 Burr. at p. 1945.
[10] (1776) 20 S.T. 355.
[11] At pp. 417, 430.

one civilian—Dr. Harris [1]—argued for the Crown. It was no wonder that the Duchess was called by Horace Walpole "the heroine of Doctors' Commons." [2] In 1782, in the case of *Anthon v. Fisher*,[3] Lord Mansfield required the question of the enforceability of a ransom contract to be argued by the civilians, and Dr. Wynne argued for the plaintiff and Dr. Scott for the defendant.[4] It was necessary to hear civilians in the court of Chancery, because that court followed the ecclesiastical law, or other law applicable, in the cases in which it had assumed jurisdiction, on equitable grounds, over cases which, but for those equitable grounds, would have been decided by other courts. Thus it heard an argument from Dr. Paul in *Sir Henry Blount's Case* [5] on the question of an appeal from the court of Chivalry; and in the case of *Harvey v. Aston* [6] it heard an argument from Drs. Strahan and Andrews on the validity of conditions in restraint of marriage. In fact, in the court of Chancery the ecclesiastical law was not infrequently discussed—a notable instance is the case of *The Duke of St. Albans v. Beauclerk* [7] on the question whether legacies given by different codicils were cumulative, or whether the later legacy adeemed the earlier. Even in the courts of law a reference was occasionally made to the practice of the civilians.[8]

Gibbon's statement that, in England, "the double jurisprudence of Rome was overwhelmed by the enormous profession of the common lawyers," though substantially true, is a little exaggerated. The sphere of that jurisprudence had, it is true, been drastically curtailed by the common law courts and the court of Chancery; but it had not been quite overwhelmed. On the contrary, it had made a contribution to the English legal system which was not inconsiderable. It is true that the legislation of the nineteenth century abolished Doctors' Commons, and substituted barristers and attornies and solicitors for the civilian advocates and proctors; [9] It is true that the courts in

[1] At p. 494.

[2] "That heroine of Doctors' Commons, about whom you inquire, the Duchess of Kingston, has at last made her folly, which I have long known, as public as her shame," Walpole's Letters (ed. Toynbee) ix 246; for a petition from the Duchess to the King in 1775 to stop the prosecution see Calendar of Home Office Papers 1773-1775, 498-499; Walpole tells us, Letters ix 312, that the King referred the petition to the attorney-general, "and it was argued at the Chambers of the Attorney. How many counsel had she retained for that single preliminary?—a mob—only fourteen"; for his account of her trial see ibid 348-349, 351, 352-355.

[3] 3 Dougl. 166. [4] At p. 168; for ransom contracts see above 534-535.

[5] (1737) 1 Atk. at p. 296. [6] Ibid 364, 367. [7] (1743) 2 Atk. 636.

[8] "Mr. Solicitor General mentioned a case which he had from Dr. Strahan and Dr. Andrews, when a heathen was admitted as a witness, but the name is not so much as known. Dr. Audley and Dr. Simpson have informed me, there was a case before the Commons in a suit for divorce, when a black was rejected as a witness, because not of the Christian religion," Omychund v. Barker (1744) 1 Atk. at p. 39.

[9] Above 684.

which the civilians practised were reformed or replaced by new courts, and that the procedure of those courts was brought into line with the procedure of the courts of common law ; [1] it is true that the Judicature Act provided that most of the law, formerly administered by the civilians, should be administered by the same High Court as administered law and equity, and that it should be administered by a code of procedure which is almost uniform.[2] All this is true. But just as the distinctive character of equity, acquired during the long period when it was administered by a separate court of Chancery by means of a procedure, and under the influence of technical ideas, which were very different from those of the common law, made it necessary that the matters formerly dealt with by that court should be entrusted to a separate Division of the High Court,[3] so, for the same reason, the long period when matrimonial testamentary and maritime causes were administered by separate courts, under the influence of the technical ideas of the civilians, made it necessary that these causes should be entrusted to another separate Division. The Probate, Divorce, and Admiralty Division of the High Court administers nearly all of those branches of law which once fell within the sphere of the civilians' practice ; so that it, together with the Chancery Division, are an ever-present reminder of the diversity of the origins of different parts of the English legal system.

VII

Blackstone and His Commentaries

Maitland and Lord Campbell have compared Bracton's treatise on the laws of England with Blackstone's Commentaries. Both books, they have truly said, are unique in English legal literature, by reason of their literary form and their completeness of treatment.[4] And there is another point of view from which the two books can be compared. Just as Bracton's treatise summed up and passed on to future generations of lawyers the results of that period of the vigorous and rapid growth of a common law, which was due partly to the strength and abilities of the Norman and Angevin Kings, and partly to the European Renaissance of legal studies,[5] so Blackstone summed up and passed on to future generations of lawyers, the results of this period of the settlement both of the principles of the many disparate parts of which the English legal system had come to consist, and of the relations of these parts to one another. The

[1] Above 683-684. [2] Vol. i 638, 646. [3] Above 604.
[4] Vol. ii 234. [5] Vol. ii 286-287.

use which I have made of the Commentaries in this and the preceding volumes of this History, illustrates the skill with which Blackstone has depicted both the form which English law, public and private, had assumed in this period as the result of its long and continuous history, and the contents of its leading principles and rules. Moreover, the historical importance of the Commentaries does not consist only in its literary excellence, its completeness of treatment, and its accurate portrayal of a period. Like Littleton's book,[1] it came at the end of a period in which the principles of the law had been continuously and logically developed by the legal profession with but small interference by the Legislature, and just before a period in which the Legislature was to take a decisive part in remodelling those principles; so that, like that book, it summed up and passed on the law of the earlier period, which was the basis and starting point of the work of the reformers of the later period.

In the first place, I shall give a brief sketch of Blackstone's career; in the second place, I shall give some account of his Commentaries and minor legal works; in the third place, I shall explain the reasons why the Commentaries were at once accepted and have continued to be accepted as a legal classic; and, lastly, I shall say something of the criticisms to which they have been subjected.

Blackstone's Career.[2]

Blackstone was born July 10, 1723. He was the fourth and youngest son of Charles Blackstone, a silk man, citizen, and bowyer of London. His father died before his birth, and his mother died before he was twelve years old. His mother's brother, Thomas Bigg, a London surgeon, superintended the education of himself and his brothers. Blackstone was educated at Charterhouse school. At the age of fifteen he was head of the school. He was distinguished as a classical scholar; and his literary ability was shown by his winning a gold medal for some verses on Milton. At the age of fifteen he went up to Pembroke College, Oxford, where he matriculated December 1, 1738. At Oxford he studied not only classics but logic and

[1] Vol. ii 574-575.

[2] The best authority is the life by Clitherow, his executor and brother-in-law, which is prefixed to the first volume of his reports; see also the Biographical History of Sir William Blackstone by Dr. Douglas, which adds little to Clitherow, and Douglas's catalogue of his works; Foss, Lives of the Judges viii 243-251; Dicey, Blackstone's Commentaries, Camb. Law Journal iv 286-307; a life by W. Blake Odgers 27 Yale Law Journal 599-618, 28 ibid 542-566; D.N.B.; for Blackstone's work at All Souls see Montagu Burrows, Worthies of All Souls, and C. Grant Robertson, History of All Souls; the sketch of Blackstone in Lord Birkenhead's Fourteen English Judges 208-216, gives some instances of his activities as counsel and judge.

mathematics; and, when only twenty, he wrote a little book on *The Elements of Architecture* which won some praise from those to whom he showed it. It deserved that praise; for it is a clear exposition of leading principles founded upon the best works on the subject [1] All his life Blackstone was interested in this subject; and he turned his knowledge to good account in the work which he did for the Codrington library,[2] and later for St. Peter's church at Wallingford.

But he never regarded architecture as anything more than a hobby. He had resolved to make his career in the law; and in 1741 he became a student at the Middle Temple—marking the occasion by the best known of his poems *The Lawyer's Farewell to his Muse*. But he did not altogether desert the Muses and literature, any more than he altogether deserted the study of architecture. He wrote some verses on the death of the Prince of Wales, an account of the quarrel between Pope and Addison, and some annotations on Shakespeare. But his *Farewell* is significant because a passage in it shows the ideal which he set before himself when he began his study of the law, and, to the end, never abandoned:

> There in a winding, close retreat,
> Is Justice doom'd to fix her seat;
> There, fenced by bulwarks of the law,
> She keeps the wondering world in awe;
> And there from vulgar sight retired,
> Like eastern queens is much admired.
> Oh! let me pierce the secret shade,
> Where dwells the venerable maid!
> There humbly mark with reverend awe,
> The guardian of Britannia's law. . . .
> In that pure spring the bottom view,
> Clear, deep, and regularly true,
> And other doctrines thence imbibe,
> Than lurk within the sordid scribe;
> Observe how parts with parts unite
> In one harmonious rule of right;
> See countless wheels distinctly tend
> By various laws to one great end.

[1] The MS. is in All Souls College Library. It consists of an introduction and twenty-nine short chapters. By way of preface Blackstone says: "The following Elements were first compiled in the summer of the year 1743. They have been since revised and transcribed, with considerable Additions and Improvements, at leisure Hours in the years 1746 and 1747. The method made use of and many of the Observations are borrowed from Sir Henry Wotton's Elements. The rest are, in great part, taken from Monsr. Freart's Parallel, and Mr. Evelyn's Account of Architects and Architecture annexed to it; from Monsr. Perrault's Admirable Translation and Comment on Vitruvius, and his Abridgment of the same Author; and from Palladio's elegant Designs, as they are now illustrated by the Notes of Inigo Jones. A few mechanical Precepts for the more commodious drawing of several Parts of Architecture are borrowed from Mr. Gibb's Rules; and as to the several Definitions, and synonymous terms of the Members, they have been chiefly furnished from Mr. Chambers' Cyclopædia."

[2] Below 719.

Blackstone never lost sight of this resolve to penetrate through legal forms to the principles of the law, and to understand the manner in which those principles united to form an harmonious legal system. The perseverance with which he attempted to realize this idea is the secret of his success as a lawyer.

In November, 1743, he was elected a fellow of All Souls College. He was not one of the founder's kin who had a preferred claim to be elected. At that period the college was very ready to elect meritorious outsiders, and did not wholly approve of the manner in which the kin urged their preferential claims.[1] At a later period Blackstone demonstrated the absurdity of their claims in his essay on *Collateral Consanguinity*, and helped the Archbishop of Canterbury, the visitor of the college, to give a decision which confined them within reasonable bounds.[2] In November, 1746, he was called to the bar, and for a time divided his time between Oxford and London. Though he was made recorder of Wallingford in 1749, he made little progress at the bar. But, though his progress at the bar was slow, he was doing much useful work for his college and the university. We shall see that he did good service to his college as its bursar and the steward of its manors,[3] and a still more valuable service in completing and arranging the Codrington library [4]—the greatest of the collegiate libraries of Oxford in the subjects of law history and economics. In 1750, the year after he had taken his degree of doctor of law, he was made the assessor, that is the judge, of the Chancellor's court. He was made a delegate of the university press in 1755, and in that capacity he effected some very salutary reforms.[5] We have seen that in 1756-1758 he took a large part in settling the scheme for the new Vinerian Professorship of English law.[6] In 1757 he was appointed one of the visitors of Michel's new foundation at Queen's College, Oxford; in that capacity he settled the disputes to which its establishment had given rise; and he completed the High Street front "which for many years had been little better than a confused heap of ruins." [7]

In 1753 Blackstone had resolved to abandon London for Oxford. We have seen that he had failed to become regius professor of civil law, and that, fortunately for English law, he had resolved to take Murray's advice, and break new ground by

[1] Grant Robertson, History of All Souls 184, tells us that between 1700 and 1750 only twelve founders' kin were elected, but between 1757 and 1777 thirty-nine out of fifty-eight vacancies were filled by the kin.

[2] The college need not have more than ten founders' kin on the foundation, but they could elect more, ibid; but between 1790 and 1852 the practice of electing the kin taken from certain families was resumed, so that fellowships at All Souls became confined to "a charmed circle of county families," ibid 185.

[3] Below 718-719. [4] Below 719. [5] Below 719.

[6] Above 94-95. [7] Clitherow, 1 W. Bl. xi.

giving lectures on English law at Oxford.[1] The success of these lectures made it inevitable that he should be appointed the first Vinerian professor of English law. From 1758 to 1766 he gave these lectures as Vinerian professor; and it was these lectures which were, as we shall see,[2] the basis of the Commentaries which were published between the years 1765 and 1769.

Blackstone's lectures had spread his fame abroad. He was asked to read them to the Prince of Wales—a request which he was obliged to decline, since the time suggested clashed with the time at which he was bound to deliver them to his pupils at Oxford. But he sent a copy to the Prince, who rewarded him with a handsome gratuity. In 1758 he refused the offer of Willes, C.J., and Bathurst, J., to make him a serjeant-at-law. In 1759 he resumed his attendance at Westminster; and in 1761 he became member for Hindon. In that year he married, and so lost his fellowship at All Souls; but he retained his connection with the university, because the earl of Westmoreland, who was Chancellor of the university, appointed him principal of New Inn Hall. His progress at the bar was now rapid. In 1761 he was offered and refused the chief justiceship of the Irish court of Common Pleas, and in 1763 he was appointed solicitor-general to the Queen. The publication of his tract on the question whether tenants in ancient demesne were qualified to vote at elections,[3] which arose out of a disputed Oxfordshire election in 1754, raised his reputation amongst lawyers; and his edition of the Great Charter and the Charter of the Forest,[4] amongst historians. The publication of the Commentaries brought him still greater fame; for the Commentaries showed that he was both a distinguished man of letters and a great lawyer. In 1766 he finally deserted Oxford—giving up his professorship and his principalship of New Inn Hall. In 1770 he was offered the solicitor-generalship, which he wisely declined. He was not a success in the House of Commons, as is shown by the episode in the House which occurred when his own Commentaries were cited against him, to prove that a member expelled is not incapacitated from re-election;[5] and he was conscious that his health would not stand the strain of the work at the bar and in the House of Commons which that office entailed.

In 1770 he accepted the post of judge of the court of Common Pleas; but since Yates, J., wished to change from the King's Bench to the Common Pleas, Blackstone consented to take his place in the King's Bench. He was a judge of the King's Bench

[1] Above 91. [2] Below 720-721. [3] Below 709-710.
[4] Below 710. [5] Vol. x 540.

from February 16 to June 22, 1770.[1] Yates, J., having died in the interval, he was appointed judge of the Common Pleas on the latter date.[2] His decisions as judge show the same qualities as his writings. They are clear and logical, and they show a familiarity with both the ancient and the modern authorities, and with the history of the law. His two most famous judgments are his decision in *Perrin v. Blake*,[3] in which he laid down the orthodox view as to the status of the rule in *Shelley's Case*; and his dissenting judgment in *Scott v. Shepherd*,[4] in which he explained the difference between trespass and case. Though he subscribed to Mansfield's mistaken doctrine [5] that money due in honour and conscience was recoverable,[6] he did not subscribe to his view that a married woman with separate property could be sued in her own name.[7] His reports show that he was a master of all the law administered in his court—of its rules of procedure [8] and pleading [9] as well as of the substantive law, and of the interpretation of modern statutes as well as the enunciation of its most ancient doctrines.[10] He was an able judge; but Foss's statement that he was "as distinguished as a judge as he had been as a commentator," [11] cannot be supported. He held his

[1] 2 W. Bl. 681; Blake Odgers, 28 Yale Law Journal 547-552, disposes of the myth circulated by Junius (Letter xli) and repeated in a somewhat different form by Lord Campbell, that Yates retired from the court of King's Bench because he had quarrelled with Lord Mansfield; Blake Odgers points out that the work of the court of King's Bench was much larger than that of the court of Common Pleas, and that Yates was ill, and in fact, died a few months after the exchange; therefore there was a very good reason why he should wish to exchange courts; see a note by Sir Frederick Pollock, L.Q.R. xxxv 212.

[2] 2 W. Bl. 719; All Souls College has recently come into the possession of a curious little memento of some of Blackstone's activities as a judge. It is a little volume, bound in limp leather covers and interleaved with blank leaves, containing two books. The first is a geography of Great Britain, consisting of a collection of maps of the counties of England, Scotland, and Wales, one hundred and fifty-eight descriptions of the routes and distances between different towns, and the names and distances from London of all cities and market towns. The second is a description of all the direct and principal cross-roads in Great Britain. Blackstone has added forty-five other routes in his own handwriting, and a list of towns visited on the Western, Oxford, Midland, and Northern circuits. He has also made a few corrections in both books. As the date of publication of the second of these two books is 1772, it may well be that it was used and annotated by him for the purpose of his duties as judge of assize. There are a few notes in another hand. One of these notes is a list of towns visited in the summer of 1795 and the spring of 1796, so that it was obviously at some time after Blackstone's death that the notes in this hand were written.

[3] (1772) Harg. Law Tracts i 490; vol. iii 109-111; above 374, 515.

[4] (1773) 2 W. Bl. at pp. 895-898. [5] Above 542-543.

[6] Farmer v. Arundel (1772) 2 W. Bl. at pp. 825-826.

[7] Lean v. Schutz (1778) 2 W. Bl. 1195.

[8] See Santler v. Heard (1775) 2 W. Bl. 1031.

[9] See Sayre v. Earl of Rochford (1778) 2 W. Bl. at pp. 1169-1170.

[10] See Gerard's Case (1777) 2 W. Bl. 1123; cp. Mast v. Goodson (1773) ibid at p. 850; Scott v. Shearman (1775) ibid at p. 978; Hatchett v. Baddeley (1776) ibid at p. 1081; Kinlyside v. Thornton (1777) ibid at p. 1113.

[11] Judges viii 249.

post as judge of the Common Pleas till his death on February 14, 1780. The last entry in his reports is a note as to the call of a serjeant on November 29 in the preceding year. Just before his death he had been asked by the trustees of the will of Sir George Downing to settle the constitution of the College at Cambridge which Downing had founded and endowed. He had accepted the task; and, if death had not intervened, the first Vinerian professor of law at Oxford might have taken a principal part in settling the rules for the election of the first Downing professor of the laws of England at Cambridge.

Blackstone was one of the most industrious of men, "an excellent manager of his time," [1] and so great a stickler for punctuality that "he could not bring himself to think well of any who were notoriously defective in it." [2] Throughout his life he had varied his literary labours with active business—in his earlier life for his college and his university, and in his later life for the improvement of the law and for his native town. We shall see that, when he was in Parliament, he sponsored an important bill to make improvements in the law as to the administration of assets,[3] and that he made many suggestions in his Commentaries for reforms in the law.[4] At the end of his life he took an active part in promoting and passing into law an Act for prison reform; [5] and he was instrumental in persuading the government to increase the salaries of the judges. The obvious reasons which make a well-paid judiciary a real economy to the state were accepted by the government of those days; but they have ceased to appeal to our modern politicians who are afflicted with that shortness of sight which is the necessary accompaniment of democratic government. He increased the prosperity of Wallingford, where he had long been settled, by promoting the construction of two turnpike roads, and he beautified it by his work in rebuilding St. Peter's Church, where he is buried, close by Priory Place, where he had long resided.

The expression of Blackstone's face was severe, for, owing to his short sight, his brow was constantly contracted; but he enjoyed society and was a cheerful companion. Though his temper was apt to be irritable, especially at the end of his life, he was naturally benevolent, and his sense of duty was high. He was naturally reserved; and his sense of the dignity of his office, and his insistence on the observance of ceremonial forms, made many think him unduly proud. His aversion to any form of exercise made him, in his closing years, very lethargic, and, indeed, shortened his life. But these are small matters when compared with his great intellectual powers, his high principles,

[1] Clitherow 1 W. Bl. xxv. [2] Ibid xxvi. [3] Below 729.
[4] Below 728. [5] 19 George III c. 74; vol. x 182-183.

and his sense of duty. It is these qualities which live in his Commentaries and his other works, and have given him his enduring place in our legal history.

Blackstone's Commentaries and his minor legal works.

Blackstone's minor legal works are, for the most part, contained in the collected edition of his *Law Tracts*, which was first published in 1762.[1]

The first of these tracts is his *Analysis of the Laws of England*, first published in 1754, which, as we have seen,[2] was a synopsis intended for the use of those who attended his lectures on the laws of England. The second is his *Essay on Collateral Consanguinity*,[3] first published in 1750, which was written to demonstrate the absurdity of extending indefinitely the classes of persons who were entitled, on the ground of consanguinity to the founder, to a preference in the elections of fellows of All Souls. Blackstone argues, in the first place, that the words of the founder's statute, the circumstances in which the statute was made, and the founder's intention, all go to show that this indefinite extension could never have been contemplated. He shows, in the second place, that neither the civil law, the canon law, the common law, the Norman law, nor feudal law, permitted the conception of consanguity to be extended indefinitely. He concludes that the College, when it refused to admit the claims of persons whose kinship was very remote, had shown, not disrespect to the founder's wishes, but the truest respect, in that they have "vindicated his meaning from gross absurdities and palpable contradictions."[4] We have seen that this Essay helped the visitor (with Blackstone's assistance) to arrive at an equitable solution of this long disputed question.[5]

The third of these tracts is his essay, first published in 1758, on the question whether tenants in ancient demesne were freeholders, and, as such, entitled to vote for knights of the shire.[6] In Blackstone's days there was not sufficient historical material available for a complete and final settlement of this question. But Blackstone uses acutely the material at his disposal; and, as we have seen, he comes to the historically correct

[1] This was an edition in two volumes; a third edition in one volume was published in 1771, to which was added the tract on the Oxford Press; my references are to this edition.

[2] Above 705.

[3] An Essay on Collateral Consanguinity, its limits, extent, and duration; more particularly as it is regarded by the statutes of All Souls College in the University of Oxford.

[4] Tracts 190.

[5] Above 705.

[6] Considerations on the Question whether Tenants by Copy of Court Roll according to the Custom of the manor, though not at the will of the Lord, are Freeholders qualified to vote in Elections for Knights of the Shire.

conclusion, which the courts have accepted,[1] that these tenants were neither freeholders nor copy holders, but a *tertium quid*.[2] Of the fourth of his tracts—his *Observations on the Oxford Press* —first printed in 1757, I shall say something later.[3] Here it will be sufficient to point out that it gives some useful information as to the history and the then state of the organization of the press, and as to the funds at its disposal. There is some evidence that, just before Blackstone finally left Oxford in 1766, he was contemplating a work on the history of the press.[4]

The last of these tracts is his edition of the Charters of John, Henry III and Edward I's reigns, which was first published in 1759.[5] The collection consists of the Great Charter of John and the documents connected therewith; the reissues of the Great Charter in 1216, 1217, and 1224; the Charter of the Forest of 1224; the confirmation of the Great Charter of 1236; the sentence of excommunication passed against those who transgressed it in 1253; the confirmation of the Great Charter of 1264; the statute of Marlborough of 1267; Edward I's Confirmation of the Charters in 1297; the Articuli Super Cartas of 1299; and a further confirmatory Charter of 1300. The edition was based upon a careful collation of the existing MSS. which are described in the introduction. It was a work of the first importance for the constitutional lawyer and historian; for, before its publication, "even the best informed writers on English history laboured under much confusion in regard to the various charters of liberties. Few seem to have been aware that fundamental differences existed between the charter granted by John and the reissues of Henry."[6] How competent Blackstone was to criticize and collate this material is shown by his controversy with Lyttleton, the Dean of Exeter, as to the authenticity of an ancient Roll in Lyttleton's possession, which contained the Great Charter of 1224 and the Charter of the Forest of the same date.[7] His introduction, though it does not contain a commentary on the text of the charters,[8] shows that he had studied minutely the history of the period, and that he could state his arguments and conclusions forcibly and clearly.

[1] Vol. iii 268 n. 6. [2] Ibid 269. [3] Below 719.

[4] Mr. Strickland Gibson tells me there are references in the records of the Clarendon Press to "Dr. Blackstone's collections," and that in 1765-1766 the university paid eight guineas for transcribing extracts from the registers into Dr. Blackstone's book on the history of the press; this book seems to have disappeared.

[5] The Great Charter and Charter of the Forest, with other Authentic Instruments: to which is prefixed an Introductory Discourse, containing the History of the Charters.

[6] McKechnie, Magna Carta (2nd ed.) 176.

[7] Tracts 328 n. (*w*); Douglas, Catalogue of Blackstone's Writings 47-67.

[8] "It is not in his present intention, nor (he fears) within the reach of his abilities, to give a full and explanatory comment on the matters contained in these charters," Tracts 284.

He showed the same critical power, and the same wide knowledge of later periods in English history in a letter which he wrote in 1775 to Daines Barrington,[1] in which he proved that an antique seal, found when pulling down a house in Oxford, was the seal made for the ecclesiastical court of the rural deanery of Sonning, pursuant to a statute of 1547.[2]

These tracts show that Blackstone was a learned lawyer and, as his adversary Priestley said,[3] a learned legal historian. They show that he could state his arguments and conclusions clearly, and that he could put them into an attractive literary form. If they had stood alone they would have given Blackstone a small place in the history of our legal literature. They would certainly not have given him enduring fame as one of those great writers on English law, such as Bracton, Littleton, Coke and Hale, who have not only accurately expounded the law of their own day, but have exercised a large influence over the future developments of the law. He won this enduring fame by his Commentaries.

Blackstone prefixed to his Commentaries his inaugural lecture on the study of the law in which, as we have seen, he gives a short history of legal education, and makes a powerful plea for including the study of English law among the subjects taught at the university.[4] This lecture forms the first section of his introduction. In the ensuing three sections he speaks of the nature of law in general, of the laws of England, and of the countries subject to the laws of England. The work itself is divided into four books, to each of which a volume is allotted. The first book deals in eighteen chapters with the Rights of Persons. After dealing in the first chapter with the absolute rights of free persons, he goes on to deal in the ensuing eight chapters with those persons or bodies to which the government of the state is entrusted.[5] These chapters thus deal with constitutional law. In the tenth chapter he deals with the distinctions between natives, aliens, and denizens. In chapters eleven to thirteen he deals with " the sorts and conditions of men " under the three heads of the clergy, the " civil state " or the laity, and soldiers and sailors. In chapters fourteen to seventeen a transition is made to private law; and the relations of master and servant, husband and wife, parent and

[1] Douglas, Catalogue of Blackstone's Writings 23-47.

[2] 1 Edward VI c. 2 § 4.

[3] An Interesting Appendix to Sir William Blackstone's Commentaries (Philadelphia 1773) 18; this book contains all the documents relative to Blackstone's controversy with Priestley, and Dr. Furneaux's letters to him.

[4] Above 96-99.

[5] The Parliament—the King and his Title—the King's Royal Family—the Councils belonging to the King—the King's duties—the King's Prerogative—the King's Revenue—Subordinate Magistrates.

child, and guardian and ward are described. The last chapter deals with corporations. The second book deals with "the Rights of Things." It is a treatise on the law of property. The first twenty-three chapters contain the best short account that has ever been written of the law of real property and chattels real. The remaining nine chapters deal with personal property—always an heterogeneous subject in English law. The third book deals with Private Wrongs. After two chapters on the redress of wrongs by act of the parties and by the operation of law, the four ensuing chapters describe the courts in which redress can be obtained. In the seventh chapter the jurisdiction of these various courts over different kinds of wrongs is described. The next three chapters deal with injuries to persons, to personal property, and to real property. Chapters eleven to sixteen deal with particular kinds of wrong to property real and personal;[1] and chapter seventeen deals with injuries proceeding from or affecting the Crown. A transition is then made to the procedure followed by the courts in giving redress. Chapters eighteen to twenty-one deal with common law procedure and pleading;[2] and chapters twenty-two and three deal with different kinds of trial, and with trial by jury. The next three chapters deal with judgment, proceedings in the nature of appeals, and execution. The last chapter deals with proceedings in courts of equity. It is in this chapter that he summarizes Mansfield's views as to the relations of law and equity.[3] The fourth book deals with Public Wrongs. It is a very able summary in thirty-two chapters of the criminal law substantive and adjective. The whole work concludes with a chapter on the rise, progress, and gradual improvement of the laws of England.

Eight editions of the Commentaries appeared during Blackstone's life-time.[4] When it first appeared the book was as popular in America as it was in England;[5] and it has never lost its popularity in America; for the progress of legal reform during the nineteenth century was not so rapid in some of the states of the United States as it was in England, so that it retained its usefulness for a longer period.[6] In the later editions

[1] Dispossession or Ouster of Chattels Real—Trespass—Nuisance—Waste—Subtraction—Disturbance.

[2] The Original Writ—Process—Pleading—Issue and Demurrer.

[3] Above 593-594.

[4] An excellent bibliography of the editions of the Commentaries is contained in Hammond's American edition i xxi-xxvii.

[5] "There is abundant evidence of the immediate absorption of nearly 2500 copies of the Commentaries in the thirteen colonies, before the Declaration of Independence," Hammond's ed. of Blackstone, Introd. ix; this justifies Burke's statement in his speech on conciliation with America in 1775, Works (Bohn's ed.) i 467, that "they have sold nearly as many of Blackstone's Commentaries in America as in England."

[6] Below 726.

published in Blackstone's life-time some amendments were made; for as Blackstone said in a postscript to the later editions, he was always ready to consider objections—" to retract or expunge from it what appeared to be really erroneous; to amend or supply it when inaccurate or defective; to illustrate and explain it when obscure." For the most part, the corrections, amendments, and additions are not very important.[1] But in the following three cases important amendments were made: first, an addition to the list of the cases in which a person was incapable of being elected a member of the House of Commons, in order to make it clear that a member who had been expelled could not be re-elected to that Parliament—an amendment which was occasioned by the controversy which arose from Wilkes's re-election for Middlesex;[2] secondly, an amendment to his definition of equity, in order to distinguish more clearly between the more general meaning of the term equity, and its more particular meaning when applied to the set of principles administered in the court of Chancery;[3] and, thirdly, a recasting of his remarks on the law relating to religious non-conformists. Of the first two of these amendments I have already spoken. Of the third I must at this point say a few words.

In 1769 Joseph Priestley, an eminent man of science and a prominent dissenter, published what Blackstone calls "a very angry pamphlet" upon certain passages in his fourth book, in which he had dealt with offences against God and religion.[4] Priestley seems to have regarded these passages as a personal attack upon himself. Blackstone, in his reply, disclaimed any idea of a personal attack, saying that the offending passages had been written fifteen years ago, before Priestley's name was known as an author; and that he only knew of Priestley as the writer of a History of Electricity, with which he had been favourably impressed. He pointed out that Priestley had confused two entirely different things—the history which he had given of the law and his comment upon this history, and his judgment

[1] Professor Hammond's American edition of the Commentaries, the text of which is the 8th edition, contains a careful collation of all the different readings of the texts of all the editions from the first to the ninth. Many of these different readings are verbal only; some are corrections of mistakes, e.g. Comm. i 269—as to the prerogative of pardon; others are more accurate statements of a rule, e.g. Comm. i 55, 77, 114, 485, ii 298; others are the result of the decisions of new cases, e.g. Comm. i 127, ii 407, 410, iv 304; others embody the effect of new statutes, e.g. Comm. i 180, iv 159, 235, 305; others omit details which the author had come to think unimportant, e.g. Comm. iv 168; others are made for the sake of clarity of style or arrangement, e.g. Comm. i 230, iii 298-299. Important corrections are most numerous in the first volume, and least numerous in volumes three and four.

[2] Vol. x 540-543.

[3] Above 591-592.

[4] The documents are printed in "An Interesting Appendix to Sir William Blackstone's Commentaries," Philadelphia 1773.

upon the laws themselves at the present day.[1] But he admitted that his words were open to this kind of misconstruction by "a willing critic"; and he promised to amend his text so that no such misconstruction should be possible.[2] Priestley thanked him for his "genteel and liberal answer," and the incident closed. Shortly after this episode Dr. Philip Furneaux, an eminent dissenting minister, wrote and published a series of seven letters to Blackstone, in which he advocated the cause of religious toleration with learning and eloquence.[3] In a second edition of these letters he acknowledges that many of his objections had been met by the corrections which Blackstone had made in his later edition. But he pointed out that Blackstone had still adhered to a view of the effect of the Toleration Act of 1688,[4] which had been condemned by the House of Lords in the case of *The Corporation of London v. Evans;*[5] for he had retained a passage from which it appeared that he still considered nonconformity *per se* to be an offence.[6] It is true that Blackstone had pointed out in a new passage in his later edition that, if the conditions imposed by the Act were complied with, no crime was committed.[7] But he had justified his original statement, that such a crime as nonconformity existed, by saying that it did not exist only if these conditions were complied with, so that it could not be said that it was "universally abrogated."[8] This was perhaps a technically correct way of stating the law; but it did not give a wholly correct impression of the effect of the Toleration Act in practice, nor of the *ratio decidendi* of Lord Mansfield's famous judgment.[9]

After Blackstone's death edition succeeded edition with

[1] "Dr. Priestley hath attributed to me the adoption of those principles, which I only meant to mention historically, as the causes of the laws which I condemn," at p. 40.

[2] At pp. 51-52.

[3] "Letters to the Honourable Mr. Justice Blackstone, concerning his Exposition of the Act of Toleration, and some Positions relative to Religious Liberty. In his Celebrated Commentaries on the Laws of England"; a second edition was published, 1771, from which my references are taken.

[4] 1 William and Mary c. 18; vol. vi 200.

[5] For this case see Furneaux 223-232; vol. x 113; Furneaux had taken down Mansfield's famous speech, which was delivered *ex tempore*; he tells us, preface to the 2nd ed., that he had shown it to Mansfield who had passed it as a correct version.

[6] "Another species of offences against religion are those which affect the *established church*. And those are either positive, or negative; positive, by reviling its ordinances; or negative, by non-conformity to its worship," Comm. iv 50.

[7] Ibid iv 54. [8] Ibid.

[9] Mansfield pointed out that the effect of the Act was to make the dissenters' way of worship legal and in fact to "establish" it, and to make gifts for the benefit of dissenting bodies valid, Furneaux, op. cit. 264-267; moreover he said: "Bare non-conformity is no sin by the common law; and all positive laws inflicting any pains or penalties for non-conformity to the established rites and modes, are repealed by the Act of Toleration; and dissenters are thereby exempted from all ecclesiastical censures," ibid at p. 278.

great rapidity.[1] Fifteen editions were produced by various editors between 1783 and 1849. In these editions the law was brought up to date either by notes, as in the twelfth to the fifteenth editions by Christian, the first Downing professor of the laws of England at Cambridge, or by notes and amendments to the text. But editors amended the text somewhat sparingly; for, as Dicey has said,[2] "the name of the commentator inspired a kind of awe." Their attitude is illustrated by the words used by Taylor Coleridge, the editor of the sixteenth edition. He said: "To me the Commentaries appear in the light of a national property, which all should be anxious to improve to the uttermost, and which no one of proper feeling will meddle with inconsiderately." [3]

But the changes in the law made during the nineteenth century were so vast, that it became impossible to adapt Blackstone's text to the new order by small changes in the text and by additional notes. This fact was realized by serjeant Stephen, the author of the classic work on pleading.[4] In 1848-1849 the first edition of Stephen's Commentaries appeared, which is now in its nineteenth edition. Dicey thinks that Stephen would have done better if he had written an entirely new book.[5] This he did not attempt.

His modesty and intense veneration for the commentator's work forbade him to enter into competition with his predecessor. He resolved not to write a new book, but to preserve or, where necessary, to amend the language of the *Commentaries*. He re-arranged the celebrated treatise from top to bottom. By an effort of infinite labour and acuteness he preserved wherever it was possible Blackstone's original language, and marked off distinctly any change introduced into it. He at the same time so modified Blackstone's words as to make them precisely correspond with the then existing law.[6]

The result was not in Dicey's opinion wholly successful. He considers that the reputations both of Blackstone and Stephen "have suffered from their literary partnership."

Stephen was above all things a logician. In editing the work he did not find full scope for exhibiting the discriminating refinement of his intellect. Blackstone was somewhat deficient in keen logical discernment. He was above all things a man of letters. His editor's efforts to correct logical defects spoilt the literary charm of the *Commentaries* without satisfying the demands of logical accuracy.[7]

[1] For a note by Sir Frederick Pollock on the pagination of the Commentaries see L.Q.R. xxii 356; it appears that the pagination of the eight editions published in Blackstone's lifetime, whether quarto or octavo, is uniform; the paging of the ninth edition is different, and the paging of the tenth edition varies from that of the ninth; the marginal pagination introduced into the twelfth edition with Christian's notes is that of the tenth edition, not, as the publishers stated, "of former editions."

[2] Camb. Law Journal iv 289. [3] Preface. [4] Vol. ix 312.

[5] Camb. Law Journal iv 289. [6] Ibid. [7] Ibid 289-290.

But his version of Blackstone had such considerable merits that, from the time when it was first published to our own days, many students have used it to begin their study of the law.

This bibliographical history of the editions of the Commentaries accounts for the unanimity of the judgments passed upon Blackstone's book by his contemporaries and by later lawyers. It was at once acclaimed as a classic both by lawyers and by men of letters. It was praised by Lord Mansfield [1] as the perfect students' book soon after it had appeared; and it was cited with approval by him in 1768; [2] Gibbon read it three times and made a full and careful abstract of the first volume; [3] both Priestley [4] and Furneaux [5] spoke with respect of the author's abilities; and Bentham praised its literary qualities,[6] and admitted that, though there were mistakes, Blackstone was generally accurate in his statements of the law.[7] This judgment of Blackstone's contemporaries has been ratified by posterity. That it has been ratified is proved by the respect with which the book has been treated by its various editors, many of whom were eminent lawyers,[8] and by the verdict passed upon it by Fitz-James Stephen in his *History of the Criminal Law*.[9] He gives high praise to the treatment of the criminal law in the fourth Book; and of the work as a whole he says:

> Blackstone first rescued the law of England from chaos. . . . He gave an account of the law as a whole, capable of being studied, not only without disgust, but with interest and profit. If we except the *Commentaries* of Chancellor Kent, which were suggested by Blackstone, I should doubt whether any work intended to describe the whole law of any country possessed anything like the same merits.

The ratification of this judgment is proved also by the respect shown to the book by Blackstone's successors on the bench. In the case of *The Queen v. Millis* [10] his account of the law of marriage is cited by Lord Campbell and the other Lords in terms of the highest approval; [11] and in many other cases judges

[1] Holliday, Life of Mansfield 89-90.

[2] R. v. Wilkes (1768) 4 Burr. at p. 2567.

[3] "A more respectable motive may be assigned for the triple perusal of Blackstone's commentaries, and a copious and critical abstract of that English work was my first serious production in my native language," Autobiographies of Edward Gibbon, Memoir C 286; for an account of this copious and critical abstract see App. IV (5); L.Q.R. lii 46-52.

[4] "Every Englishman is under obligation to this writer for the pains he has taken to render the laws of his country intelligible, and the philosopher will thank him for it," An Interesting Appendix to Sir William Blackstone's Commentaries 32.

[5] In the first page of his first letter he spoke of the Commentaries as a "truly admirable performance."

[6] Below 724.

[7] "'Tis very rarely that I should think of contending with our Author concerning what is Law," A Comment on the Commentaries (Everett's ed.) 147.

[8] Above 715.

[9] Vol. ii 214-215.

[10] (1844) 10 Cl. and Fin. 534.

[11] At pp. 767-768, 821, 839, 897.

have cited and relied upon his statements of law. Two cases, for instance, in 1935 recognize the authority of the Commentaries on the question of the power of magistrates to bind over a person to be of good behaviour,[1] and on the question of the power of the police to enter premises to prevent crime.[2] Lord Redesdale, indeed, denied that the Commentaries were a book of authority. He said :[3]

> I am always sorry to hear Mr. Justice Blackstone's *Commentaries* cited as an authority. He would have been sorry himself to hear the book so cited. He did not consider it such.

No doubt Blackstone did not consider his book a book of authority. But that is beside the point. The question whether a book is a book of authority depends upon the manner in which it is received and treated by the courts. Judged by this standark, I think that it would be true to say that the Commentaries, though they do not possess the same amount of authority as the works of Coke and Hale, have been received and treated as a book of authority.

I must now attempt to explain the reasons why the Commentaries were from their first publication accepted as a legal classic.

Why were the Commentaries from their first publication accepted as a legal classic ?

The reasons why, from their first publication, the Commentaries were accepted as a legal classic must be sought, first, in the intellectual qualities of their author, and, secondly, in their origin, and the circumstances in which they were composed. We shall see that for these two reasons the merits of the Commentaries were so outstanding that they have had a considerable effect, direct and indirect, upon later developments of the law both in this country and in the United States.

(1) *Blackstone's intellectual qualities.*

The character of Blackstone's learning, the characteristics of his mind, and the events of his life, united to give him the power to produce the only complete and literary account of the principles of English law that has ever appeared in the course of its long history. Let us look at his intellectual qualities from these three points of view :

Blackstone's learning. We have seen that Blackstone was a classical scholar, the author of some critical notes on Shake-

[1] R. v. Sandbach [1935] 2 K.B. 192 ; Comm. iv 256.
[2] Thomas v. Sawkins [1935] 2 K.B. 249 ; Comm. i 356.
[3] Shannon v. Shannon (1804) 1 Sch. and Lef. at p. 327.

speare, and himself something of a poet.[1] He had thus laid a firm literary foundation for his legal and historical studies at Oxford and in London. The range of those studies was much wider than that of most English lawyers; for he combined with an accurate knowledge of English law, which he had learned from books and by attendance on the courts, a knowledge of English history, political theory, and Roman law, which he had learned at the university. It was this unique combination of the learning of the English lawyer and university learning which explains the distinctive excellence of the Commentaries. The best evidence of the quality of Blackstone's learning in English law is the Commentaries themselves, his Law Tracts, and the reports of his decisions as a judge. The best evidence of the range of his university studies, and of his capacity to assimilate the essence of the books which he had read, is the list of authorities cited by him in the Commentaries, and the use which he makes of them. It is clear that he had studied the best authorities on all periods of English history, the texts of Roman law, foreign commentaries on Roman law, writers on international law and jurisprudence, and the works of such political thinkers as Locke, Montesquieu, Burlamaqui, and Beccaria.

As we shall now see, the characteristics of Blackstone's mind enabled him to turn his literary gifts and his wide range of learning to the best account.

The characteristics of Blackstone's mind. Two words describe the leading characteristics of Blackstone's mind—order and system. These characteristics appear both in his active life and his literary work—the literary style was an index to the character of the man. As illustrations of the display of these characteristics of Blackstone's mind I shall take some of his achievements at All Souls and in the University of Oxford. We shall see that they help to explain the effectiveness of all his literary work—his Law Tracts as well as the Commentaries.

We have seen that Blackstone had filled at All Souls the position of steward of the manors of the college and of bursar.[2] Montagu Burrows has told us that during the ten years that he was steward of the manors of the college he "applied his legal mind to the examination of all the documents bearing on the college property, and rearranged its archives."[3] Of his term of office as bursar he has left us a memento in the shape of a *Dissertation on the Accounts of All Souls College*.[4] It was addressed to his successor as bursar; and, as Sir William Anson says, "it exhibits to the full the orderly character of Black-

[1] Above 704. [2] Above 705. [3] Worthies of All Souls 400.
[4] Printed in the publications of the Roxburgh Club with a preface by Sir William Anson.

stone's intellect, and the dignified suavity of his style." In it Blackstone tells us that he had "been very early engaged in" the financial side of college business, and "continued for a considerable time, either as an accomptant, an assistant, or an auditor." [1] The thoroughness of the work which he did in connection with the college estates is illustrated by another statement in the same tract: "In the year 1747 I remember to have compared all the leases then subsisting with the rentals and to have corrected a great many mistakes; most of them to the disadvantage of the College (for the tenants will take care of themselves) and some of them of near seventy years standing." [2] His work on the Codrington Library was as conscientious and as solid. In 1710 Codrington had left £10,000 and £6000 worth of books to build and endow a library. The foundation stone had been laid in 1716. But, for some years before Blackstone's election to All Souls, the work had come to a standstill. On its completion and arrangement Blackstone spent many years of work. "To him," says Montagu Burrows, "the library owes the excellent arrangements which distinguish it to the present day. By judicious management Codrington's £10,000 was increased to £12,000, and an endowment was formed for the future increase and care of the books out of the surplus left when the building was completed." [3] Bacon's statue of Blackstone, a statue so remarkable for the life-like expression of the face that we must suppose that the sculptor knew Blackstone personally, is now the chief ornament of the library.

Blackstone's efforts on behalf of the university press were no less conspicuous and successful. When he was made a delegate of the press he found it in an effete condition—"languishing in a lazy obscurity, and barely reminding us of its existence, by now and then slowly bringing forth a Program, a Sermon printed by request, or at best a Bodleian Catalogue." [4] The letter to the Vice-Chancellor, in which he not only entered a protest against this neglect, but also suggested salutary measures of reform, is, as we have seen,[5] printed in his Law Tracts; but the more piquant and personal passages are omitted. It is an excellent specimen both of his literary powers and of his capacity for affairs. We have seen too that he had a good deal to do with the speedy settlement of the scheme for giving effect to Viner's will.[6]

All Blackstone's literary works show that capacity for reducing to order and system even the most intractable material,

[1] At p. 3. [2] At p. 42. [3] Worthies of All Souls 389.
[4] From Blackstone's original letter to the Vice-Chancellor.
[5] Above 710. [6] Above 94-95.

which we see in his active work as bursar and delegate of the Press. It was just the sort of capacity that was needed for a pioneer student's treatise on English law. The material was vast, scattered, and often expressed in too technical a shape to be intelligible to a beginner. It was only a man with an orderly and systematic mind, a man with the sympathetic mind of an historian, a man with great powers of exposition, who could from this material produce a treatise which was comprehensive, clearly arranged, lucid, and literary. In this task he was, I think, helped by the events of his life.

The events of Blackstone's life. I do not think that anyone can produce a really successful book on English law unless he has had some practical experience of the working of the law. Blackstone for many years divided his time between the courts at Westminster and Oxford. At Oxford his experience as assessor in the Chancellor's court, as steward of the college manors, and as bursar, gave him much practical experience of different sides of the law; and he took an active part in college and university business. The practical acquaintance with the working of the law, which he thus acquired, helped him to expound legal rules and doctrines with a vividness and a reality which cannot be learned from books. If, as Maitland said, "law is the place where life and logic meet," a due proportion of life and logic is needed to make a successful lawyer and a successful law book. Blackstone's career, like Maitland's, was a successful blend of the two, and it helped both men to write law books which were at once recognized as classics.

(2) *The origin of the Commentaries and the circumstances in which they were composed.*

I do not think that these intellectual qualities would necessarily have resulted in the production of a legal classic, if the book had been written out for publication and immediately printed. It was because the Commentaries originated in courses of lectures repeated every year for thirteen years, and because, at the end of that time, they were composed with great care by their author, that they attained that final touch of excellence which entitles them to be called classical. Let us look at these two stages in the composition of the Commentaries.

Blackstone's Lectures. Some account of the manuscripts of the lectures will be found in the Appendix.[1] It is clear from the *Analysis of the Laws of England*,[2] and from these manuscripts, that, from the first, Blackstone had systematically planned his lectures. He gave them as a private lecturer from 1753-1758. In 1758 he was made first Vinerian professor of

[1] App. IV (4). [2] Above 709.

English law. His duties as professor were to give one public lecture in each of the four terms in the year, and a course of sixty private lectures, for which private lectures he was entitled to charge a fee. It was these private lectures, which he had formerly given as a private lecturer, which were the basis of the Commentaries. Two facts prove the truth of this proposition. In the first place, we have seen that he told Priestley in 1769 that the passages to which he had objected had been written fifteen years ago.[1] In the second place, we have seen that Viner's bequest involved the election of Vinerian scholars as well as a Vinerian professor.[2] These scholars were obliged to attend the Vinerian professor's lectures. Blackstone tried (without success) to get the University to release from this obligation those Vinerian scholars who had attended the lectures which he had given as a private lecturer. Blackstone continued to give these lectures till he resigned his chair in 1766. In 1761 he said in a letter relative to the appointment of deputies to read his public lectures, that, during the three years that he had been professor, he had only appointed a deputy once or twice for his private lectures, and then only for a single lecture. His lectures were thus subjected to a continuous reconsideration from 1753 till 1766. This fact is proved by his own statements in his lectures, and by the statements made by his hearers. In one of the manuscripts of these lectures it is recorded that, after thanking the students for their regular attendance, he said that, "to rectify mistakes, to retrench superfluities, and to supply the deficient parts, must be the most agreeable employment of my future leisure"; [3] and in another manuscript the fact that improvements had been made in the lectures is noted.[4]

The composition of the Commentaries. Bentham, who had attended Blackstone's lectures, said that he was "a formal, precise, and affected lecturer"; but he admitted that his lectures were popular.[5] In fact, many copies of the lectures were in circulation, and were eagerly prized—so eagerly prized that there was reason to fear that some pirate might print them from a defective set of notes. It was for this reason that Blackstone, like Plowden before him,[6] determined to publish

[1] Above 713. [2] Above 94.

[3] MS. D, App. IV (4); the passage is contained at the end of vol. 3 of the MS.

[4] MS. E, App. IV (4); the passages are cited below p. 750.

[5] "Blackstone was a formal, precise, and affected lecturer—just what you would expect from the character of his writings: cold, reserved, and wary—exhibiting a frigid pride. But his lectures were popular, though the subject did not then excite a wide-spreading interest, and his attendants were not more than from thirty to fifty," Works x 45.

[6] Vol. v 365-366.

them himself. Let us listen to the story in Blackstone's own words : [1]

> The truth is, that the present publication is as much the effect of necessity, as it is of choice. The notes which were taken by his hearers have by some of them (too partial in his favour) been thought worth revising and transcribing ; and these transcripts have been frequently lent to others. Hence copies have been multiplied, in their nature imperfect, if not erroneous ; some of which have fallen into mercenary hands, and become the object of clandestine sale. Having therefore so much reason to apprehend a surreptitious impression, he chose rather to submit his own errors to the world, than to seem answerable for those of other men.

Both law and letters owe something to these "mercenary hands" ; for, in an earlier part of his Preface, Blackstone tells us that he was hesitant as to whether he would not best consult his reputation by "a total suppression of his lectures."

Some legends have gathered round the period of the composition of the Commentaries. One story is that Blackstone, while writing his last volume, was much disturbed by the riotous parties given by Oliver Goldsmith on the floor above.[2] Another story is related by Boswell, on the information of Dr. Scott, the future Lord Stowell : [3]

> Dr. Scott of the Commons came in. He talked of its having been said that Addison wrote some of his best papers in *The Spectator* when warm with wine. Dr. Johnson did not seem willing to admit this. Dr. Scott, as a confirmation of it, related that Blackstone, a sober man, composed his *Commentaries* with a bottle of port before him ; and found his mind invigorated and supported in the fatigue of his great work, by a temperate use of it.

Whether these legends are true or not, there is no doubt that Blackstone took very great pains to work up the raw material of his lectures into a great book. Sir William Jones,[4] in a letter to Lord Kenyon, says that the Commentaries were inspected in manuscript by most of the judges on the bench.[5] If this story is true it shows that Blackstone must have taken the trouble to get the best advice and criticism. That it is very probably true is shown by a letter dated January 25, 1766, which he sent to Charles Yorke.[6] Yorke had, as we have seen,[7] published a tract on the law of forfeiture for treason. In this letter Blackstone says that he had heard that Yorke thought that, in his first volume, he had differed from some of the propositions in Yorke's tract. He writes to say that he did not think that that was the case. His first volume, he said, shows that he was

[1] Preface to the 1st ed. of the Commentaries.
[2] See Blake Odgers 27 Yale Law Journal 612-613.
[3] Boswell, Life of Johnson (Birkbeck Hill ed.) iv 91, April 15, 1781.
[4] Vol. xi 220-221. [5] G. T. Kenyon, Life of Lord Kenyon 112.
[6] British Museum Add. MSS. 35,637, f. 337. [7] Above 362-363.

much indebted to Yorke's tract. His second volume "now in the press" shows that he is not satisfied that the doctrine of corruption of blood is a reasonable doctrine; but that he is satisfied that the doctrine of forfeiture to the Crown for treason is reasonable. He sends Yorke the proof sheet, and asks for criticism. "The press will stand till he has received it."

Both in the composition of the Commentaries, and in the amendments to the later editions,[1] Blackstone was careful to bring and keep his statements of law up to date. Therefore it was inevitable that the Commentaries should, at many points, show the large influence which Mansfield was exercising upon many parts of the English legal system. He was a personal friend of Blackstone,[2] and, when the Commentaries were being composed, and during the whole of the remainder of Blackstone's life, his influence was at its height. In fact some of the main divergencies between the lectures, which were written before 1753, and the Commentaries, the first volume of which was written some eight or nine years after Mansfield had become Chief Justice of the King's Bench, were due to his influence. Thus in one of the MSS. of the lectures,[3] Blackstone, speaking of bills of exchange and promissory notes, explains that the assignability of these instruments was due to the custom of the merchants, and then he goes on to say that, "in England such custom in cases of commerce is sufficient warranty, so that the knowledge of these things would be much easier learnt on the royal exchange than in the courts of Westminster Hall." This remark does not occur in the corresponding chapter of the Commentaries;[4] and its omission is a striking confirmation of the well-known statement of Buller, J., in the case of *Lickbarrow v. Mason*,[5] of the manner in which Mansfield was constructing a system of commercial law. Similarly in his treatment of the doctrine of consideration,[6] and of the relation of law to equity,[7] Mansfield's views are substantially reproduced.

These, then, are the reasons why the Commentaries, ever since their first publication, have been accepted as a legal classic. I must now attempt to sum up briefly their outstanding merits, and the influence which they have had upon legal development.

First, as Dicey has said, "the *Commentaries* live by their

[1] Above 713 n. 1.
[2] Above 705-706.
[3] MS. C, App. IV (4); the passage is in vol. 13 of the MS.
[4] Vol. ii chap. 30.
[5] (1793) 2 T.R. at p. 73; above 282; cp. Comm. ii 460, where Blackstone says of the law of marine insurance that the law on this subject "hath of late years been greatly improved by a series of judicial decisions; which have now established the law in such a variety of cases, that (if well and judiciously collected) they would form a very complete title in a code of commercial jurisprudence"; for Mansfield's achievement in this branch of the law see above 536-540.
[6] Comm. ii 445-446; vol. viii 25-34.
[7] Above 593-594.

style." [1] When they first appeared Gibbon said of them that they " may be considered as a rational system of English Jurisprudence, digested into a natural method, and cleared of the pedantry, the obscurity, and the superfluities, which rendered it the unknown horror of all men of taste " ; [2] and Mansfield said of their style that it was " pleasing and perspicuous." [3] Bentham, Blackstone's most bitter critic, in a well-known passage in his *Fragment on Government*, is even more eulogistic. He said : [4]

> Correct, elegant, unembarrassed, ornamented, the *style* is such, as could scarce fail to recommend a work still more vicious in point of *matter* to the multitude of readers. He it is, in short, who first of all institutional writers has taught Jurisprudence to speak the language of the Scholar and the Gentleman : put a polish upon that rugged science : cleansed her from the dust and cobwebs of the office : and if he has not enriched her with that precision that is drawn only from the sterling treasury of the sciences, has decked her out, however, to advantage, from the toilette of classic erudition : enlivened her with metaphors and allusions ; and sent her abroad in some measure to instruct, and in still greater measure to entertain, the most miscellaneous and even the most fastidious societies.

Secondly, the excellence of Blackstone's style is, as Dicey points out, accompanied by a supreme literary tact.

> He knew when to curtail and when to abound. . . . He knew that he was a teacher of law, and neither a legislative reformer, nor a logical dogmatist, nor a legal antiquarian. He remembered that the primary object of a teacher is to excite the intelligent interest of his readers or his hearers. Hence he selected for special exposition topics which are at once interesting and important, and thus has enlisted the attention of one generation after another of charmed readers.[5]

This quality was also emphasized by John Taylor Coleridge, who edited the sixteenth edition of the Commentaries. He said : [6]

> It requires the study necessarily imposed upon an editor to understand fully the whole extent of the praise to which the author is entitled ; his materials should be seen in their crude and scattered state ; the controversies examined of which the sum is only shortly given ; what he has rejected, what he has forborne to say should be known ; before his learning, judgment, taste, and above all his total want of self display, can be justly appreciated.

Thirdly, the Commentaries are a very accurate account of the law of Blackstone's own day. Anyone who will be at pains to take a paragraph of the text of the Commentaries, and compare it with the authorities on which it is based, will find that Black-

[1] Camb. Law Journal iv 294.
[2] British Museum Add. MSS. 34,881 ; App. IV (5) ; L.Q.R. lii 48-49.
[3] Holliday, Life of Mansfield 89-90.
[4] Fragment on Government (Montague's ed.) Pref. p. 116.
[5] Camb. Law Journal iv 296.
[6] Preface.

stone uses his lucid style and his literary talent to translate his authorities into English which faithfully reproduces their gist. Hammond, who is perhaps the most learned of all the American editors of Blackstone, says that the Commentaries are

> one of the few books upon any subject in which the reader will see fuller meaning and more precision of statement in exact proportion with the knowledge of the subject which he himself brings to the reading; at least, the editor may say from his own experience that after repeated perusals (almost a score of them with successive classes of students) he still sometimes finds new force and meaning in Blackstone's words, when read in connection with a new question, or knowledge that he had not before.[1]

Fourthly, though the Commentaries are not a history of English law, but a statement of what that law was in Blackstone's own day, they are in fact the best history of English law which had yet appeared. In his inaugural lecture, which he prefixed to the Commentaries, Blackstone emphasized the need for the study of legal history;[2] and it is to his study of legal history, and to the use which he made of it, that the Commentaries owe a large part of their excellence. Throughout the book legal principles are explained by reference to their history; and he concludes his book with an historical summary of the chief epochs in the history of English law, which inspired Reeves to write his history.[3] Blackstone realized that it was only by an historical method that the law of his day could be rationally explained and taught; and he also realized two important truths which Maitland has emphasized—first, that effective legal history involves comparison, and, secondly, that it is a history of ideas.[4] Throughout the Commentaries Blackstone introduces comparisons with foreign law, and tries to get down to the fundamental ideas which underlie the legal rules in force at different periods in the history of English law. It is true that some of his historical work has not stood the test of modern research. He is weak on the earlier parts of our legal history, especially on the Anglo-Saxon period. But from the reign of Edward I onwards his history is generally sound. Pollock and Maitland's great history covers the period during which Blackstone's work is weakest. That history and the Commentaries present a picture of the historical development of English law down to Blackstone's day which, in its main outlines, is very fairly adequate.

Lastly, we have seen that the completeness of the book has been emphasized both by Lord Campbell and by Maitland.[5] We have seen, too, that Fitz-James Stephen considered that this

[1] Hammond, Blackstone's Commentaries, Pref. p. xiv.
[2] Comm. i 35-36, cited above 98.
[3] Above 413.
[4] Comm. i 36, cited above 98.
[5] Above 702.

quality of completeness was unique, not only in English, but also in foreign, legal literature.[1] Stephen's verdict is endorsed by Professor Lévy-Ullmann. He has pointed out that in France no such complete treatise exists—" Can we find," he says, " outside England a work of equal breadth produced by a single author? We know of none " ;[2] and he points out that the fact that so complete a book appeared at this time probably had large effects on the future of English law. Its completeness, he suggests, helped to render unnecessary a general codification of English law. " Who would say," he writes,[3] " that our old lawyers learned in the customary law, who drew up the civil code, would not have thought their task useless, if their guide and master Pothier—the French Blackstone—had given our country a complete commentary on the laws of old France? "

As we might expect, so great a book has had a considerable influence upon the future development of the law.

First, it would perhaps be hazardous to say, with Professor Lévy-Ullmann, that it was owing to the completeness of Blackstone's work that no general codification of English law was undertaken. But I think that it is true to say that his summary of the main principles of English law was of great assistance to the law reformers of the nineteenth century, because it gave them a clear view of the law which they proposed to reform. Similarly his work was and is of great assistance to us modern lawyers, because it helps us to steer our way through that labyrinth of statutes which have changed the face of English law. Secondly, the immense popularity of the Commentaries in America, both before and after the Declaration of Independence,[4] has helped to add to the link of a common language that other link of common legal principles. The recent gift by the Americans of Blackstone's statue was a graceful return, not merely for hospitality, but for the work of the man who had played a great part in the forging of that link of common legal principles. Thirdly, we have seen that Blackstone was the pioneer of our modern system of the university teaching of law.[5] His ideas on this subject were accepted first in the United States,[6] and later in this country ;[7] and in both countries it has effected a great improvement in the literature of the law, and therefore in the law itself.[8]

Blackstone's book described the law of the eighteenth century. It was a child of its age, not only in the perfection of its

[1] Above 716.
[2] La Systeme Juridique de l'Angleterre i 269. [3] Ibid 272.
[4] Hammond, Blackstone's Commentaries, Pref. p. ix ; cp. Holdsworth, Some Lessons from our Legal History 174-176.
[5] Above 96-99. [6] Above 99-100.
[7] Above 100. [8] Above 99 and n. 4.

form and style, but also in its ideas. Even when he was writing it, and still more when he was revising its later editions, the eighteenth century was passing. New economic conditions and new political ideas were producing a demand for extensive reforms in the law; and that demand grew more and more insistent in the years which followed. Therefore Blackstone's book, which was not only a faithful picture of the law of his day, but a glowing appreciation of its merits, became the target of criticism which became more bitter as the need for reform became more pressing. To a consideration of this criticism we must now turn.

Blackstone's critics.

Just as Blackstone represented the mentality of the age of settlement which was rapidly passing, so Bentham represents the mentality of the new age of reform which was rapidly coming to birth. Though there were other critics of Blackstone,[1] it was he, and his school of analytical jurists, who historically are the most important. They were destined to dominate the legal thought of the first half of the nineteenth century; and it was their criticism which led to an undue depreciation of Blackstone's achievement, which was not corrected till the rise of the school of historical jurists in the latter part of that century.

The two main criticisms which Bentham and his school made upon Blackstone were, first, that he was an indiscriminate apologist for all things established; and, secondly, that, as a political and jurisprudential thinker, he was weak and confused. Let us examine the justice of these criticisms.

(1) *The charge that Blackstone is an indiscriminate apologist for all things established.*

There is certainly an element of truth in this charge—one instance is the manner in which he justifies the law as to benefit of clergy as it stood in his day.[2] This characteristic of Blackstone's work struck Gibbon. Remarking upon Blackstone's

[1] One of these critics was James Sedgwick, who in 1800 published a quarto volume of 304 pages entitled "Remarks Critical and Miscellaneous on the Commentaries of Sir William Blackstone," which had some success, as it reached a second edition in 1807; the remarks are confined to the first volume of the Commentaries, and are concerned mainly with Blackstone's political and jurisprudential theories, and with his treatment of various topics of constitutional law; the author is as great an enemy to natural rights as Bentham; he is therefore opposed to the democratic theories of the French revolutionaries, and defends the institutions of an hereditary monarchy and aristocracy; the book is somewhat verbose and pretentious, and the author is sometimes a little muddled, e.g. in his treatment of sovereignty (pp. 124-127); he criticizes Blackstone's theory as to the authority of precedent, and takes the then obsolete view that a judge need not follow a decision if he considers it to be unreasonable (pp. 68-70).

[2] Comm. iv 371, cited vol. iii 302.

strictures upon the absence of any teaching of English law at the universities, he says, " Mr. Blackstone touches upon their neglect, with the becoming tenderness of a pious son who would wish to conceal the infirmities of his parent." [1] Blackstone, in later editions of the Commentaries, tried to meet this charge by saying that his praise of existing institutions and laws was given, not to the manner in which they were often perverted in practice, but to the principles which underlay them.[2] It is not a very successful defence because it tends to confuse explanation of the origins of rules of law with their justification as existing rules at the present day. But, though there is substance in this charge, there is less substance than is commonly supposed. Even Bentham was forced to admit that " the dark side of the picture was not left wholly untouched." He cannot, however, refrain from adding the silly sarcasm that the critical passages in the Commentaries were probably by another hand—" One would think some Angel had been sowing wheat among our Author's tares." [3]

Blackstone at many points criticizes things established. In his inaugural lecture he says that one reason for the academic study of the law is the possibility that professors might be able to suggest improvements, which would not occur to busy practitioners.[4] And in the course of his Commentaries he criticizes the game laws,[5] the doctrine that a felon's blood was corrupted,[6] the denial of counsel to persons accused of felony,[7] the poor law,[8] the law of inheritance,[9] and the frequency with which capital punishment was inflicted.[10] We have seen that he criticized the conflicting character of the rules of law and equity.[11] He criticized also " the awkward shifts, the subtile refinements and the strange reasoning " upon which the capacity of a common recovery to bar an estate tail depended, and recommended either a repeal of *De Donis*, or that every tenant in tail should be given the fee simple, or that the tenant in tail should be able to bar the estate tail by a deed enrolled.[12] He was inclined to favour

[1] British Museum Add. MSS. 34,881, below 730 n. 1 ; App. IV (5).

[2] Blackstone had said, Comm. i 172, that the representative system was not in fact " quite so perfect as I have here endeavoured to describe it " ; to that remark he appends the following note : " The candid and intelligent reader will apply this observation to many other parts of the work before him, wherein the constitution of our laws and government are represented as nearly approaching perfection ; without descending to the invidious task of pointing out such deviations and corruptions, as length of time and a loose state of national morals have too great a tendency to produce. The incurvations of practice are then the most notorious when compared with the rectitude of the rule ; and to elucidate the clearness of the spring, conveys the strongest satire on those who have polluted or disturbed it."

[3] *Fragment on Government* (Montague's ed.) 123.

[4] Comm. i 30. [5] Ibid iv 416. [6] Ibid ii 256.

[7] Ibid iv 355-356. [8] Ibid i 365. [9] Ibid ii 233.

[10] Ibid iv 10, 18, 239. [11] Ibid iii 441, cited above 601.

[12] Ibid ii 360-361.

the project of a general register of deeds and wills.[1] He supported a bill for making extensive reforms in the law as to the administration of assets—*inter alia* the rights of preference and retainer were to be abolished, and the real property of traders was to be made liable for their simple contract debts.[2] We have seen that in the University of Oxford he advocated and carried through a reform of the university press; and that, at the latter part of his life, he pushed forward schemes of prison reform.[3] Last but not least we have seen that he condemned the absence of any proper provision for legal education, and advocated that system of university teaching of law which prevails to-day.[4] I think that these illustrations show that Blackstone was fully aware of some of the defects of the English legal system. But, as Gibbon said, he was a very respectful critic.[5] In fact, Gibbon's brief comment more correctly represents Blackstone's approach to the shortcomings of English law than Bentham's sweeping indictment of his hostility to all reformation.

Blackstone's mental attitude was not peculiar to himself. It was the mental attitude of many representative Englishmen in the eighteenth century. Many representative Englishmen in that century were proud, and rightly proud, of English institutions and English law. Was not England the one State in Europe where the law was supreme, and the liberty of the subject was protected? Had not English institutions and English law won the praise of such representative foreigners as Montesquieu and Voltaire? And because Englishmen were proud of their institutions and their law, they were not averse to an intelligent criticism of tendencies which seemed to them to be evil, or of practical abuses which they had observed. As Horace Walpole said, "there is a wide difference between correcting abuses and removing landmarks."[6] A remarkable passage at the end of the eighth chapter of the first Book of the Commentaries[7] might (if chronology permitted) be taken to be a sermon on the text of Burke's famous *dictum* that "the power of the Crown, almost dead and rotten as Prerogative, has grown up anew, with much more strength, and far less odium, under the name of Influence."[8] Indeed, in one very important matter Blackstone went even further than Burke was ever prepared to go—he admitted the need for some measure of Parliamentary reform.[9] These

[1] Comm. ii 342-343.
[2] British Museum Add. MSS. 35,879; for an account of this and other similar bills see L.Q.R. lii 52-53.
[3] Above 708, 719. [4] Above 96-99. [5] Above 728.
[6] Letters (ed. Toynbee) xiii 86. [7] Comm. i 335-337.
[8] Present Discontents, Works (Bohn's ed.) i 313.
[9] "If any alteration might be wished or suggested in the present frame of Parliaments, it should be in favour of a more complete representation of the people," Comm. i 172; cp. ibid i 174, where he says, "The misfortune is that the deserted boroughs continued to be summoned."

eighteenth century statesmen and lawyers were no worshippers of antiquity. In fact they were inclined to despise past ages as "Gothic" and barbarous by comparison with the enlightened age in which they lived. It was this intelligent satisfaction with the present, which Blackstone shared with many leaders of thought in his days, that has given rise to exaggerated views as to his indiscriminate optimism and conservatism.

But this attitude of mind is better suited to a static age than to an age of change. When things are, on the whole, going well, when the nation is as a whole content with its law and government, received views on fundamental questions can and will be accepted without any very rigid analysis. The Revolution settlement, and its theoretical justification by Locke, satisfied many minds. But at the end of Blackstone's life the age was ceasing to be static. Both in England and abroad there were signs of coming changes. In England new economic ideas, and the progress of the industrial revolution, were making changes necessary. It was this need for changes, it was the feeling that the older statesmen and thinkers, who lived in an atmosphere of intellectual contentment with things established, were incapable of making them, which inspired a new criticism of the premises of the received political and legal ideas. In the sphere of legislation and jurisprudence Bentham was the intellectual leader of this party. In fact Bentham gave expression to ideas which many had begun to entertain. This is shown by the fact that, some time before Bentham came forward as the critic of Blackstone, Gibbon had expressed views very similar to his. Like Bentham, he was opposed to the mystery in which some legal doctrines had been shrouded by the lawyers; he preferred the enacted to the unenacted law; and he believed in testing the expediency of a law by the criterion of utility.[1]

Bentham's hostility to Blackstone dated, he tells us, from 1763-1764 when he had listened to Blackstone's lectures at Oxford—"I, too, heard the lectures; age, sixteen; and even then no small part of them with rebel ears."[2] His hostility became more bitter as he became older. It became a sort of obsession, which caused him to descend to abuse which was unworthy of him;[3] and his example was followed by his dis-

[1] Gibbon's analysis of and remarks upon vol. i of Blackstone's Commentaries are to be found in the British Museum Add. MSS. 34,881, ff. 217-241; see App. IV (5); L.Q.R. lii 46-52.

[2] Works i 249.

[3] Thus he says of Blackstone, Works x 141, "his hand was formed to embellish and to corrupt everything it touches; he is infected with the foul stench of intolerance"; "in him every prejudice has an advocate, and every professional chicanery an accomplice"; "he carries the disingenuousness of the hireling advocate into the chair of the professor"; "his is the *foedum crimen servitutis*."

ciple Austin,[1] who even went so far as to deny the merits of Blackstone's literary style.[2] Bentham's abuse is, I think, the main cause for exaggerated views as to Blackstone's optimism and conservatism. It was he who gibbeted Blackstone as the enemy of all reform; and, as we shall now see, it was he who convinced many that, as a political and jurisprudential thinker, Blackstone was weak and confused.

(2) *The charge that, as a political and jurisprudential thinker, Blackstone is weak and confused.*

This is in substance the charge which Bentham made against Blackstone in his famous *Fragment on Government.* That book represented and expressed the ideas of those who were conscious that radical reforms in the law were becoming necessary, and of those who were dissatisfied with the received theories of law and government. It was, as Bentham truly said, "the very first publication by which men at large were invited to break loose from the trammels of authority and ancestor wisdom on the field of law."[3] It is a detailed criticism of Blackstone's account of the origin of governments, contained in the section of his Introduction entitled "The Nature of Laws in General." It was published anonymously; and its literary qualities were such that, as Bentham says, "more than one father was found for it: each of the very first class . . . Lord Mansfield, Lord Camden and Mr. Dunning."[4] It made Bentham famous; and Dicey has said that, "among men of thought Blackstone's reputation as a profound jurist never recovered the blow struck at him by the *Fragment on Government.*"[5]

The *Fragment on Government* was originally a part of a larger work entitled *A Comment on the Commentaries.* But it was so separate a part that Bentham detached it, and published it as a separate tract. The larger work, from which the *Fragment on Government* was detached, has recently been printed with a valuable introduction by Mr. Everett. It exhibits all the well-known characteristics of Bentham's writings—his insistence on the principle of utility,[6] his preference for enacted

[1] For a collection of passages see Hammond, Blackstone's Commentaries iv-v; he tells us that "when Mr. Campbell, his editor, finds a passage in Mr. Mill's notes of Austin's lectures in which Blackstone seems to be treated with an 'unusual respect,' he could not help doubting its authenticity, until he had satisfied himself that it was meant to be ironical."

[2] See the passage cited by Dicey, Camb. Law Journal iv 287-288.

[3] Note in Bentham's own copy of the work, Works i 260 *note.*

[4] Fragment, Pref. to the 2nd ed., Works i 240.

[5] Camb. Law Journal iv 291.

[6] A Comment on the Commentaries, 27-28, 192.

law,[1] his advocacy of codification,[2] his want of historical sense,[3] his inclination to ascribe to the knavery of lawyers rules for which there was a sound historical explanation.[4] We have seen that his dislike of case law, and his early admiration of Lord Mansfield,[5] led him to introduce a piece of very sound criticism on Mansfield's attempt to reform the law by means of judicial decisions.[6] At other points also there is acute criticism of undoubted defects in English law,[7] and of inconsistencies in Blackstone's statements of the law.[8] On the other hand, some of his criticisms are captious and savour of the special pleader.[9] On the whole, the *Comment on the Commentaries* is a book more especially for lawyers. For that reason I think that Bentham acted wisely in detaching and publishing separately his *Fragment on Government*. The subject-matter of the *Fragment* appealed to a wider audience, and Blackstone's treatment of it laid him open to more obvious criticism.

I think, however, that it may be maintained that, in spite of Bentham's criticisms in the *Fragment* and in the *Comment on the Commentaries*, and in spite of Dicey's partial approval of the former criticism, there is more to be said for Blackstone's views than is commonly supposed. Just as Blackstone's intellectual standpoint can be explained by the character of the age in which the Commentaries were written, so Bentham's criticism can be explained by the character of that succeeding age of which, from many points of view, he was the intellectual forerunner. The intellectual outlook of the two ages was very different. Both had their strong and their weak points; and the two men who represented these two very different points of view both saw much to which the other was blind.

In many countries in Europe at the latter part of the eighteenth century, dissatisfaction with existing institutions was producing new theories of law and government, and projects of reform. We have seen that one of the pioneer treatises in the field of law was Beccaria's.[10] It is true that there was not the same dissatisfaction with the law and government in England as there was in many of the European States. Even Bentham ad-

[1] A Comment on the Commentaries 125-126. [2] Ibid 143.
[3] Ibid 160-161, 216. [4] Ibid 162, 169, 181.
[5] "From the first morning on which I took my seat on one of the hired boards, that slid from under the officers' seats in the area of the King's Bench . . . at the head of the gods of my idolatry, had sitten the Lord Chief Justice," Works i 247.
[6] Above 558-559.
[7] E.g. on the law as to the right to light, A Comment on the Commentaries 237.
[8] Ibid 80, 129.
[9] Ibid 108-109, 230-231; we can see the same qualities in his criticisms in the Fragment on Government—e.g. he praises de Lolme for saying substantially the same things about the merits of the English constitution as he had ridiculed when they were said by Blackstone, see L.Q.R. xlv 447 n. 15.
[10] Vol. xi 575-579.

mitted that the government of England was, in spite of all its imperfections, " the finest and most excellent of any the world ever yet saw." [1] But Gibbon's criticism [2] shows that, even in England, it was becoming clear that large reforms were needed ; and the intellectual attitude of men like Burke and Blackstone, though not hostile to all reform, was not favourable to reform on a large scale. Bentham tells us that, " some time after the appearance of the *Fragment* (1776), the House of Commons was found to contain a small knot of young men, in whose minds a disposition to contribute to the improvement of the law had begun to manifest itself." [3] But on what principle were these reforms to be made ? Bentham was ready with an answer—the principle of utility. That principle, applied by a sovereign Legislature, was to be the principle which was to settle both what reforms were needed and how they were to be made. The application of this principle in this way to existing institutions, and to the reasoning by which, in Blackstone's Commentaries, those institutions were supported, led to some surprising conclusions. Shelburne,[4] and others who admired the *Fragment on Government*, could not help seeing that here was a principle which could be used as a guide to suggest and to justify changes which must sooner or later be made, if the law and institutions of England were to be brought into conformity with the new conditions which were rapidly arising. They had, moreover, all the eighteenth-century appreciation of the piquancy of Bentham's trenchant attack upon a man of Blackstone's eminence and reputation. Naturally in the succeeding age of sweeping law reforms, which were inspired by many of Bentham's ideas, Bentham's demonstration of the confused character of Blackstone's political reasonings seemed to be too clear for argument. The current view, the view which Dicey accepts, is well stated by M. Glasson : [5]

> The philosophical part of Blackstone's work is confused and obscure. While accepting the theory of natural law in the sense in which Grotius had understood it, he sometimes seems to make some approach to the doctrines which deny or alter this superior and immutable law. . . . We can read in the first chapters of the Commentaries the doctrines of Grotius : he has copied them word for word from Burlamaqui. The theory of Locke, which derives law from the social contract, and that of Hobbes which has for its object the denial of natural right, do not induce him to abandon the doctrines of Grotius, though they had long divided English political thinkers into hostile camps.

[1] A Comment on the Commentaries 211. [2] Above 730 ; App. IV (5).
[3] Preface to the 2nd ed. of the Fragment, Works i 241.
[4] For Shelburne's early interest in Bentham and his books, see Bentham's Works i 248-249, 252.
[5] Histoire de Droit et des Institutions de L'Angleterre, v 398-399.

But is it fair to Blackstone to test his work in this way? Blackstone was sketching a picture of the evolution of the British constitution, and of its salient features as it existed in his day. That picture owed much to the works of political philosophers, English and foreign—to Hobbes and Locke, to Montesquieu, Grotius, Pufendorf, Beccaria, and Burlamaqui. Blackstone, with much skill and literary tact, used their books to explain the history and present state of the British constitution. Rightly and naturally, he refused to follow all their theories. He had read and mastered this philosophical learning; but he was not mastered by it.[1] If he had been mastered by it he could not have painted a picture of the complex British constitution which was substantially in accordance with the facts; for, if the facts are not logical, and are not capable of explanation on any one theory, a truthful exposition of the facts must reflect something of their inconsequence. To apply to an historical sketch of that kind an analysis based on the principle of utility and the doctrine of sovereignty, is both unreasonable and misplaced. Such a criticism was able to afford abundant opportunities for condemnation; but, like Hobbes's criticism on Coke,[2] it was unfair, because it approached the subject from a point of view totally different from that of the work criticized. In Blackstone's day, as in Coke's day, the British constitution and English law were a mosaic of enactments and customs and conventions, which, because they came from all periods of English history, represented divergent ideas taken from many periods of that history. It contained many ideas which could not be easily reconciled with the modern doctrine of sovereignty; and utility was only one of the many principles on which it was based. But we should note that, because it was a law of this character, it was eminently adaptable to different circumstances and to different ideas. The fact that, while accepting the doctrine of sovereignty, it did not accept all its logical implications, was I think a virtue rather than a vice;[3] and that it refused to pin itself down to the principle of utility as expounded by Bentham, shows that the spirit of its rules was informed by a far wider knowledge of human nature than Bentham ever possessed.

The best illustration of this characteristic of Blackstone's work is his attitude to Montesquieu's famous theory of the separation of powers.[4] Blackstone was well aware of the fact

[1] As M. Dunoyer says, Blackstone et Pothier 88, "Blackstone ne suivit aucun de ses auteurs dans la plenitude de leurs systêmes, il leurs emprunta seulement quelques idées éparses."

[2] Vol. v 481-482.

[3] See Holdsworth, Some Lessons from our Legal History 131-133.

[4] Vol. x 715-716, 724.

that Montesquieu's theories were not in their entirety applicable to the British constitution. He was equally well aware of the fact that in England the powers of government were more divided than they were in France and other continental monarchies. He uses Montesquieu, but he does not subscribe to the view that his theory of the separation of powers is the sole and sufficient cause for the excellence of the British constitution. He looks at the facts, and finds the cause in the balance of the powers of separate and autonomous organs of government, and in the control of the law as interpreted by the courts.[1] In a later passage,[2] it is true, in which the advantages of an independent judiciary are set out, we can see clearer traces of Montesquieu's influence. But it does not go beyond the facts, and it is defective only in failing to note the administrative character of the control which the court of King's Bench exercised under judicial forms.

I think that less than justice has been done to Blackstone's abilities as a political thinker. He was not writing a book upon political science, but a description of the principles of English law public and private. His mentality was, as I have said, typical of the eighteenth century. And there is no doubt that, in the new age which was beginning to open in the last years of that century, that mentality erred on the side of slowness to admit the need for reforms. There is no doubt also that, in the sphere of law reform, Bentham's ideas supplied a necessary stimulus, a creed, and a programme. But the need for that stimulus was to some extent caused by the Tory reaction which was provoked by the excesses of the French Revolution. As we have seen, both Blackstone and Burke were ready to criticize and to suggest reforms, provided that no attempt was made to undermine the basic principles of the British constitution and English law. Neither showed the blind opposition to all change which characterized Eldon and Ellenborough. Dicey has said that, "in the ordinary course of things the law of England would have been amended before the end of the eighteenth, or soon after the beginning of the nineteenth century";[3] and Bagehot has said that, "if it had not been for the terror excited throughout Europe by the French Revolution, the old system of parliamentary representation could hardly by any possibility have lasted as long as it did."[4] But the French Revolution, and the Tory reaction which it caused in England, stopped all chance of reform on these lines. And so, when reform did come, it was a reform which was inspired by the new Whigs who had learned

[1] Comm. i 154-155, cited vol. x 716.
[2] Comm. i 269-270, cited vol. x 417.
[3] Law and Opinion (1st ed.) 123.
[4] Essays on Parliamentary Reform 143.

from Bentham, and not by the old Whigs who had learned from Burke. This was the reason why the legend of Blackstone's incompetence as a political and a jurisprudential thinker was perpetuated; and it helped for nearly a century to diminish the fame of the Commentaries.[1] But these controversies are now a century old. We suffer from other ills than those which oppressed the age to which Bentham spoke; and so we can take a more impartial view of the strong and the weak points of Bentham and Blackstone.

Bentham did great things for English law by helping forward many long-needed reforms. Similarly, Austin helped English lawyers to clarify their ideas upon such fundamental matters as law, sovereignty, rights, and duties. But the school of historical lawyers which arose in the middle of the nineteenth century has deprived the school of Bentham and Austin of that sovereign control over legal thought which they exercised earlier in that century. Men like Maine and Vinogradoff, like Pollock and Maitland, like Holmes, Ames, Thayer and Wigmore, have taught lawyers a larger philosophy of law, which does not disdain the lessons of the past or the wisdom which can be extracted from old law. And so to us Blackstone is not, as Bentham pictures him, the enemy to all reformation, and the inaccurate thinker who used his literary gifts to bolster up established abuses. Rather, he is the literary artist, the historical scholar, and the accomplished lawyer, who has woven into a harmonious texture all the variegated strands which made up the fabric of that English law of the old regime, which, both in England and the United States, is the foundation of the law which governs us to-day.

The life of *a priori* philosophies of law, or indeed of any other branch of knowledge, is generally short. Blackstone's Commentaries are now a recognized legal classic both in England and the United States,[2] so that they may be said to have outlived the speculations of utilitarian law reformers and analytical jurists. But when Bentham published his *Fragment on Government* all this was in the distant future. At the end of the eighteenth

[1] Dunoyer, Blackstone et Pothier 91, speaking of Bentham's criticisms, says, "Cette vive campagne, brillamment menée, compromit pendant plus d'un siècle le succès des Commentaires. C'est parce que Blackstone s'est risqué dans une philosophie du droit, sagement évitée par Pothier, qu'il a manqué perdre en Angleterre une grande partie de son crédit."

[2] Sir Frederick Pollock, L.Q.R. xxxv 212, has truly said: "It appears to us that the time has come for editing Blackstone as an historical classic. Ability to do this is not wanting in the legal faculty of Blackstone's university, and the work would be most fitly undertaken by the Clarendon Press"; some years ago a proposal by some members of the Oxford law faculty to do this work was made to the Clarendon Press; but the Press (ungratefully, considering what it owed to Blackstone) turned it down.

century, the age of that settlement of the mechanism and principles of the English legal system, which Blackstone had so skilfully portrayed, was almost over, and the age of law reform, which was destined to be dominated by Bentham and his school, was beginning. The manner in which, under their guidance, the law of the predominately rural and aristocratic society of the eighteenth century was recast, and adapted to the needs of the predominately industrial and increasingly democratic society of the nineteenth century, will be the subject of the next volume of this History.

APPENDIX

I

VINER'S BEQUEST TO OXFORD UNIVERSITY

(1) *A copy of such part of Viner's will as relates to the University of Oxford*

Gough, Oxford, 96.

I give to the chancellor, masters, and scholars of the university of *Oxford*, all those my books, whether in sheets or otherwise, and which are unsold or not disposed of (excepting some sets only hereinafter mentioned) of that my work, called or known by the name of *a general abridgement of law and equity*, which I have remaining by me, or which are now in the hands or possession of any other person or persons for my use; to be disposed of and sold, and the money arising thereby to be applied, by and with the approbation of a majority of the members there in convocation to be assembled for that purpose (on public notice given) for the nominating, appointing and establishing a PROFESSORSHIP of the common law in the said university; and to put it upon a proper foot, that young gentlemen who shall be students there, and shall intend to apply themselves to the study of the common laws of *England*, may be instructed and enabled to pursue their studies to their best advantage afterwards when they shall attend the courts at *Westminster*, and not to trifle away their time there in hearing what they understand nothing of, and thereupon perhaps divert their thoughts from the law to their pleasures: that a certain annual handsome allowance be fixed upon to be made to such PROFESSOR and his successors, to be chosen from time to time by the said university in convocation assembled; and that the income of the surplus be disposed of in a proper manner by the said convocation, whereby to raise a fund for a continuance of the said work by way of *addenda*, at about the distance of twenty or five and twenty years, as shall be thought by the said university most proper and convenient, according as books of reputation shall be published for the future of cases adjudged in law and equity.

Item, my will and desire is, that such PROFESSOR so to be elected should be at least a master of arts, or a bachelor of the civil law in the said university, and likewise a barrister at the common law, and should read a solemn lecture and lectures when and so often as such convocation shall think proper and direct, so as such time of reading shall not interfere or be within the time of the law terms.

And my will further is, that after an ample provision according to the judgment and approbation of the said convocation shall be made and secured for such PROFESSOR as aforesaid, the remaining parts

of the monies to arise from the sale of the residue of my said abridgment shall be disposed of, by and with the direction and approbation of such convocation assembled or to be assembled as aforesaid, for the constituting, establishing and endowing one or more FELLOWSHIP or FELLOWSHIPS, and SCHOLARSHIP or SCHOLARSHIPS, in any college or hall in the said university as to such convocation shall be thought most proper for students of the common law; such fellow or fellows to be master or masters of arts, or bachelor or bachelors of civil law, and such scholar or scholars to be of two years standing at least at the time of election; and that one at least of such fellows should be proposed as a tutor to such students in the said university as shall be intended for such study; and that as often as a fellow or fellows die, or such fellowship or fellowships shall otherwise become vacant, the said scholar or scholars may from time to time succeed to such fellowship or fellowships if approved of by the said convocation; otherwise some other to be chosen or nominated by them, whom they shall think more proper. And in case such professorship as is before mentioned shall at any time or times become vacant, my will is that such convocation shall from time to time nominate and appoint a proper successor or successors; but in such case I would recommend it to them to appoint such fellow, or one of such fellows as aforesaid, in case he or either of them shall be really deserving to succeed to such vacancy.

Item, my will is, and I do hereby give and devise all my printed law books which are not part of my own abridgment (and which are hereinbefore undisposed of and excepted) to be lodged and placed in the *Radcliffe* library in the said university, for the use of such students as shall be inclined to have recourse to them.

Then follow several pecuniary and other legacies, and after those, a devise to the University of the reversion of *Meanham* meadow near the city of *Gloucester* (charged with an annuity to Mr. *John Weeks* for his life) expectant on the decease of the reverend Dr. *Thomas Clifton* without issue of his body lawfully to be begotten, living at his death; "*to be disposed in the same manner, as to the establishing a professorship and fellowships and scholarships, as is hereinbefore mentioned or directed.*" And then after several other pecuniary legacies, he concludes thus:

And all the rest, residue, and remainder of my real and personal estates, not herein or hereby otherwise given or bequeathed, I give devise and bequeath to the chancellor, masters, and scholars of the said university of *Oxford*, to be disposed in the same manner as is herein before mentioned and directed as to the books herein before bequeathed is mentioned; and I do hereby nominate and appoint the said chancellor, masters, and scholars of the said university executors of this my last will and testament.

Dated, 29 *December*, 1755.

(2) *The Advertisement issued by Viner's Administrators as to the Sale of the Abridgment.* Oxford University Archives, Viner

Oxford, 22 *January*, 1757.

The late CHARLES VINER, Esq., having by his last Will and Testament bequeath'd the Residue of his Estate and Effects, after Payment of his Debts and Legacies, to the University of Oxford; for founding therein a PROFESSORSHIP OF THE COMMON LAW, and for other Purposes in his said Will mentioned: and a considerable Part of the said Estate and Effects, consisting in about *four hundred Copies*

of a Work entitled, *A General Abridgment of Law and Equity;* whereof *twenty one* Volumes were published, and the *twenty second* (which completes the Work) was printed off in his life time: the *Administrators* with the Will annexed of the said CHARLES VINER, for the more speedy and effectual Completion of his Designs, are authorized by the said University to propose to the Public, and in particular to the Gentlemen of the Law, the immediate Sale of the said *four hundred Copies* on the following

CONDITIONS

I. That the said Work (consisting of *twenty two* Volumes in folio, together with a Volume of *Index*, completed and, in part, printed off by MR. VINER) shall be deliver'd to the Subscribers *in Sheets* before the end of next *Trinity Term*.

II. That the Books shall be deliver'd in LONDON, and also in OXFORD; for the Convenience of different Subscribers.

III. That the Price to Subscribers shall be *fifteen Pounds;* seven to be paid on Subscribing, and eight on Delivery of the Books.

N.B. The original Price of the *twenty one* volumes, published by MR. VINER, was *twenty six pounds*.

IV. That the Subscriptions be paid to *Francis Child Esq.; and Co.*, Bankers in LONDON, or to *Mr. Thomas Walker* Solicitor to the Administrators, in OXFORD; who will give proper Receipts to the Subscribers.

V. That if the Number of the Subscribers should be considerably fewer than *four hundred*, the Money subscribed shall be return'd before the End of next *Trinity Term;* the principal View of this Proposal being to raise an immediate Fund, by disposing of the whole Impression, rather than to wait the Event of a slow, though perhaps a more profitable, Sale.

N.B. The twenty second Volume (title EVIDENCE) and the *general Index* (of *Cases abridged*) will be publish'd separate, to complete Sets; Price, twelve Shillings each *in Sheets*. And most of the former Volumes may now be had separate, to complete Sets at fifteen Shillings each *in Sheets*, of J. WORRALL, in *Bell Yard*, near *Lincoln's Inn;* and J. RIVINGTON and J. FLETCHER at the *Oxford-Theatre in Pater-noster-Row;* LONDON.

II

THE BUSINESS OF THE COURT OF CHANCERY DURING THE CHANCELLORSHIPS OF HARDWICKE AND ELDON

Parlt. Papers 1810-1811 vol. iii

(1) 1745-1755

	Causes.	Exceptions, Further Directions, and Equity Reserved.	Rehearings and Appeals.	Pleas and Demurrers.	Petitions.	Motions.
Michaelmas 1745 to Michaelmas 1746 .	202	87	7	31	198	3769
Michaelmas 1746 to Michaelmas 1747 .	178	92	6	28	178	3787
Michaelmas 1747 to Michaelmas 1748 .	193	88	6	32	198	3732
Michaelmas 1748 to Michaelmas 1749 .	181	57	5	27	170	4060
Michaelmas 1749 to Michaelmas 1750 .	178	75	6	27	205	4073
Michaelmas 1750 to Michaelmas 1751 .	120	53	6	26	128	2981
Michaelmas 1751 to Michaelmas 1752 .	140	68	6	23	157	3935
Michaelmas 1752 to Michaelmas 1753 .	170	62	9	30	153	4091
Michaelmas 1753 to Michaelmas 1754 .	139	64	3	24	143	4066
Michaelmas 1754 to Michaelmas 1755 .	137	66	4	26	123	3386

(2) 1800-1810

Michaelmas 1800 to Michaelmas 1801 .	87 including 11 Consent	43	2	10	333	4684
Michaelmas 1801 to Michaelmas 1802 .	52 including 16 Consent	83	5	17	262	4745
Michaelmas 1802 to Michaelmas 1803 .	60 including 9 Consent	33	5	12	296	4748
Michaelmas 1803 to Michaelmas 1804 .	87 including 12 Consent	24	17	14	337	5160
Michaelmas 1804 to Michaelmas 1805 .	58 including 8 Consent	21	17	22	318	6050
Michaelmas 1805 to Michaelmas 1806 .	42 including 10 Consent	48	6	10	275	5674
Michaelmas 1806 to Michaelmas 1807 .	56 including 10 Consent	47	9	37	253	6001
Michaelmas 1807 to Michaelmas 1808 .	41 including 17 Consent	46	10	19	257	6909
Michaelmas 1808 to Michaelmas 1809 .	54 including 15 Consent	28	9	18	207	6362
Michaelmas 1809 to Michaelmas 1810 .	33 including 7 Consent	38	11	21	180	6730

III

BLACKSTONE'S TREATMENT OF EQUITY IN HIS LECTURES [1]

May 30th, Lecture 15th.[2]

Before we enter on the proposed subject of this ensuing lecture we must have recourse to the former Definition of Equity, which is the correction of that, in which the Law by reason of its universality, is deficient, for as all cases cannot be foreseen, or if foreseen, cannot be expressed, it is necessary, that such a power should be vested somewhere, otherwise the rigour of the law, though it cannot properly be said to do any injustice, would yet bear very hard upon many, and therefore the Legislature leaves [*sic*] the correction of those hardships. *Lex non exacte definit boni viri arbitrio permittit.* ex gr: A lends to B £1000 on the mortgage of his Estate, to be repaid within the year, and if not paid the Estate shall be forfeited to the Mortgagee. Here then if B the Mortgager does not repay the £1000 by the Time specified he is for ever barred from the Estate at Common Law, but this being a great hardship to B, the Estate being for instance worth £5000 and the Debt but £1000, therefore the Court of Equity interposes weighing all the circumstances of the case, and allows the Mortgager to redeem his Estate, on paying the Debt and Costs, and this is called the Equity of Redemption.

Hence we see how impossible it is that in its Essence Equity can be reduced to any stated rules for then it would become an absolute positive Law: but the only true ground and stable maxim of a Court of Equity is this, that if one hath a right, he hath also a remedy, and when the Law cannot, Equity will grant it to him, and from the consideration of Equity as a mere supplement to the Common Law naturally arise the following rules Dig. 3.5.47.[3] Grav. Orig. B. 1st 38.[4] concerning the *jus honorarium* of the Romans.

(1) That Courts of Equity shall not interfere where the Common Law has made any express provision for giving redress; so that if a Debt be sued for by a Bill in Equity the Defendant may demur to the Bill for want of Equity, and refuse to answer in that Court.

(2) It must not sap or weaken the fundamental pillar of the Law, in order to redress a seeming hardship in rights that are merely positive depending solely on the Will of the Legislature and in which Conscience is not at all concerned, so that in the case of the Exclusion of the half

[1] Vol. 22 of MS. C—the MS. of the lectures in the Library of All Souls College; for this MS. see below 748.

[2] For the plan of these lectures see below 747. The times and the number of the lectures had evidently been modified between 1759-1760 when the Scheme was published and 1761-1762 when the All Souls copy was taken; this is clear from the fact that in the MS. this is the XVth lecture, while, according to the Scheme, the general heading of Private Wrongs, under which this topic is dealt with, only occupies fourteen lectures.

[3] *Quaere* is the reference to the following fragment from Paulus: "Nec refert directa quis an utili actione agat vel conveniatur, quia in extraordinariis judiciis, ubi conceptio formularum non observatur, haec subtilitas supervacua est, maxime cum utraque actio ejusdem potestatis est eundemque habet effectum." This would express fairly well the difference between some of the salient characteristics of the common law and equity procedure; it has nothing to do with the *jus honorarium*; but takers of lecture notes make strange blunders.

[4] This is a reference to cap. xxxviii of Gravina's book, *De Ortu et Progressu Juris Civilis*; the latter part of the chapter contrasts the equity of the *jus honorarium* with the strictness of the *jus civile*.

Blood from the Inheritance, how unreasonable soever it may seem, yet shall not be redressed by Equity, because the right of Succession is founded not on the Law of Nature but on compact, not on any primitive natural Right but on the Law of the State, and therefore this being a general rule, shall not be superseded, vide the above quoted Digest.[1] It is a fundamental rule that the real estate shall descend to the heir and the personal to the executors and administrators, to pay the Debts and legacies of the Deceased and the residue to be distributed to the next of kin : therefore the Heir cannot claim any right to the personalty exclusive of the Executors, and this serves to explain the maxim *Aequitas sequitur Legem*, that is, it must be conformable and only supplemental to the Law. On this account a Mortgaged Estate, though a realty in itself, shall descend to the Executor and not the Heir of the Deceased or rather the heir shall be the trustee of the said Estate for the Executor for it being only a security for money which is a personalty and the Mortgagee having acquired no real property is only personal as the money lent upon it would be likewise. . . .[2]

(3) All suits in Equity must necessarily be of longer duration than those at Common Law, for at Common Law one or two leading points are the things upon which the whole will turn, as in the case of a mortgage, the case will be, Did A execute the Deed ? Did he pay the money stipulated at the time appointed ?—which being answered, determines the whole : But in Equity every minute Circumstance must be laid open to full View, and the Equity of the Case must result from a comparison of all these together. When Frauds are brought into Daylight after 20 years concealment when family disputes long forgotten and perhaps never known, are revived and dragged into open Court. So that so far from wondering that a Chancery Suit may sometimes last 20 years, we may rather be surprised that they ever end at all.—Having premised this much, we shall soon see how difficult it will be to draw out into a particular system the proceedings in Equity, but in general it may be said that Equity gives relief chiefly in Frauds when there is no remedy at Common Law, as in cases when money is lent upon Bond on false pretences, to which there are no Witnesses present but the parties, or such as are dead ; in matters of accident, or to relieve a Mortgager or Lessee against a penalty or forfeiture when the intention was to have paid the Debt or Duty, but some extraordinary Cause or Temporal inability happened to prevent it. But the most universal object of Courts of Equity are Trusts which are Creatures of their own making and cognizable nowhere else. To these 3 Heads of Fraud Accident and Trust may be almost entirely referred, either immediately or by consequence, the ordinary and usual Business of a Court of Equity. As that herein all unreasonable Engagements are annulled, reasonable ones are enforced ; Copy holders are relieved against the oppressions of the Lords ; Customs of manors, Heriots or Services may be ascertained. When the Law charges one person with a Debt or Duty others that are included in the same reason of it may be compelled to concur in the Discharge of it. As when a rent is charged upon an Estate which is afterwards divided among three partners, and if one of the Shares is distrained for the rent, Equity will oblige the others to contribute their due proportions. Here the Liberty of Common is adjusted, Executors are obliged to give security for personal Chattels of which the remainder is limited or which they are

[1] It is difficult to know to what this refers. "9.12 f. 1" is added to the MS. in another hand ; but this is an impossible reference, as bk. 9 of the Digest has only four sections.

[2] The MS. indicates that a sentence or sentences are missing here.

to keep a long time in their hands. Wills of land are here established or set aside, Conveyances Defective by Fraud or Mistake are perfected; Accounts are adjusted; Assets are discovered, Suits for a *modus decimandi* are determined; Deeds for conveying of popish livings to protestants to avoid the University presentations are examined; Statutes of Limitation pleaded in Bar of actions are in some emergencies suspended. Unreasonable actions at Common Law are stopt by Injunctions; Multiplicity of actions for the same cause may be prevented or united into one by a Bill of peace; Judgements also in the Courts of Law are rendered ineffectual by inhibiting the plaintiff from proceeding to Execution; Waste is hindered and the possession of Land is quieted and settled, long agitated by Ejectments and long determined in Favour of the possessour. These and many others are transacted by the Court of Chancery and Exchequer which have a concurrent jurisdiction, but the Chancery has the greatest part of the Business, which may be owing to the Number of the Judges in the Exchequer in consequence of which uniformity of Opinion cannot always be expected, as it may be in the Chancery, which is governed by one Judge who generally is, as he ought to be one of the best Lawyers in the Kingdom, since by this sketch you may observe the vast extent of his Jurisdiction.

The Chancery has likewise a superior authority to the Exchequer, and can give relief where that cannot it being concurrent with the Ecclesiastical Courts in obliging the payment of Legacies and Tythes and likewise with the Admiralty with regard to maritime causes. It superintends the Employment of all money and land given to charitable uses. It has lately acquired a new Branch of power, viz. that of relaxing in its own discretion some of the rigors of the Act for preventing clandestine marriages. It regulates all proceedings in relation to Bankrupts. It is likewise general guardian of Infants, Ideots and Lunaticks. Therefore in stating the practise of the Courts of Equity, we shall consider the Chancery, to which the Exchequer generally conforms.[1]

IV

BLACKSTONIANA

(1) *The Advertisement of Blackstone's Pre-Vinerian Lectures*

All Souls' College Library.
OXFORD, 23 *June*, 1753.

In *Michaelmas* Term next will begin
a
Course of Lectures
on the
Laws of England
By Dr. Blackstone, of *All-Souls' College*.

This Course is calculated not only for the Use of such Gentlemen of the University, as are more immediately designed for the Profession of the Common Law; but of such others also, as are desirous to be in

[1] This represents the first part of Bk. III, c. 27, of the Commentaries (pp. 426-442). The remainder of the lecture, which is comprised in this and part of the succeeding volume of the MS., deals with the procedure and system of pleading in the court of Chancery, and corresponds fairly closely to the remainder of chapter 27 (pp. 442-455).

some Degree acquainted with the Constitution and Polity of their own Country.

To this end it is proposed to lay down a general and comprehensive Plan of the Laws of *England;* to deduce their History; to enforce and illustrate their leading Rules and fundamental Principles; and to compare them with the Laws of Nature and of other Nations; without entering into practical Niceties, or the minute Distinctions of particular Cases.

The course will be completed in one Year; and, for greater Convenience, will be divided into four Parts; of which the first will begin to be read on *Tuesday* the 6th of *November*, and be continued Three times a Week throughout the Remainder of the Term: And the following Parts will be read in Order, one in each of the three succeeding Terms.

Such Gentlemen as propose to attend this Course (the Expence of which will be six Guineas) are desired to give in their Names to the Reader some Time in the Month of *October*.

(2) *The Advertisement of Blackstone's Course of Lectures and his Inaugural Lecture as Vinerian Professor.* Gough, Oxford 96.

OXFORD, 21 *October*, 1758.

NOTICE is hereby given,

THAT, by the Appointment and with the Approbation of the Vice-Chancellor, the ſolemn Lectures on the Laws of *England* are to be read by Mr. VINER's Profeſſor in the *Hiſtory-School*, and the complete Courſe in *All-Souls-College-Hall*, till a School of Municipal Law ſhall be fitted up for thoſe ſeveral Purpoſes.

The Profeſſor alſo gives this publick Notice that he propoſes to begin his Courſe on *Monday* the 20*th* of *November*, at the Hour of Ten in the Morning; and to read a general introductory Lecture in the *Hiſtory-School* on *Wedneſday* the 25*th* Inſtant, at the Hour of Eleven.

*** He begs the Favour of ſuch Gentlemen as propoſe to attend his Courſe, to ſend in their Names ſome Time in the preceding Week.

(3) *The Advertisement of Blackstone's Course of Lectures for the year 1759-1760, and the Scheme of the Course.* Gough, Oxford 96.

OXFORD, 18 *June*, 1759.

THE *Vinerian* Professor gives this public Notice, that he proposes to begin his complete Course of private Lectures for the Year ensuing on *Wednesday* the tenth Day of *October* next, and to finish the same on *Saturday* the twenty-ninth Day of *March;* proceeding, as nearly as possible, according to the following

SCHEME OF THE COURSE

Rights of Persons.		Rights of Property Real.		Rights of Property Personal.		Private Wrongs.		Public Wrongs.	
Lect. i.	*Oct.* 10	*Lect.* i.	*Nov.* 30	*Lect.* i.	*Jan.* 14	*Lect.* i.	*Feb.* 14	*Lect.* i.	*Mar.* 8
ii.	11	ii.	*Dec.* 1	ii.	15	ii.	15	ii.	10
iii.	12	iii.	3	iii.	17	iii.	16	iii.	11
iv.	13	iv.	4	iv.	19	iv.	18	iv.	13
v.	16	v.	6	v.	21	v.	19	v.	15
vi.	17	vi.	8	vi.	22	vi.	21	vi.	17
vii.	19	vii.	10			vii.	23	vii.	18
viii.	20	viii.	11			viii.	25	viii.	20
ix.	22	ix.	13			ix.	26	ix.	22
x.	23	x.	15			x.	28	x.	24
xi.	25	xi.	17			xi.	*Mar.* 1	xi.	26
xii.	27					xii.	3	xii.	27
xiii.	29					xiii.	4	xiii.	29
xiv.	30					xiv.	6		
xv.	31								
xvi.	*Nov.* 1								

The Lectures will begin exactly at Ten in the Morning, in the School of Municipal Law.

(4) *The Manuscripts of Blackstone's Lectures*

I have seen five manuscripts of these lectures which I shall distinguish by the letters A, B, C, D, E.

A

This manuscript is in the library of the Law Society. It is a transcript of the Lectures given in 1753—the first course which Blackstone delivered. It was taken by Thomas Bever of whom I have given some account (above 644-645). His transcript is contained in two folio volumes, which are obviously a fair copy from rough notes. It is a careful set of notes with full references to the authorities cited by the lecturer. At the end some advice is given to students as to books and other methods of attaining a knowledge of the law, which is a shorter form of the note in MS. C (below 748-749).

B

This manuscript is also in the Law Society's library. It claims to be Blackstone's own copy written out by himself. A note at the beginning of the volumes, signed by the donor, J. D. Blake, and dated July 28, 1832, contains the following statement: "This and the accompanying three volumes contain Mr. Justice Blackstone's MS. of the lectures originally delivered by him. They were shown by me to the late Mr. Cook, formerly clerk to Judge Blackstone (afterwards to Mr. Justice Buller), and declared by Cook to be in the handwriting of Judge Blackstone." I do not think that this claim can be substantiated for the following reasons: (1) I think the lectures are written out in two hands; and the hand most like Blackstone's exhibits important differences from his handwriting. (2) The notes are short and sometimes scrappy. They are far less in bulk than MSS. A, C, and D.

They look as if they were taken by a student who got down as much as he could in longhand. (3) Internal evidence is against the view that they are Blackstone's own notes. At one point there is a reference to a tract on descents by William Blackstone, Esq.—this is hardly the way in which Blackstone would refer to his own work. At another point (vol. 3, Lect. II.) there is a reference to the plea *nul tiel record*. It is written *nul record*—clearly the auditor had missed the second word. Then, what are we to make of the following sentence ?—" The former part of this lecture must be taken out of the analysis and its deficiencies supplied by Wood. It seems indeed to contain nothing of great importance, except the distinction between courts of record and not of record " (ibid). I think that the MS. is a fair copy of notes taken by a student in the year 1762—for so a note in vol. 2 seems to tell us.

C

This manuscript is in All Souls College Library. It was made in 1761-1762, since a note at the end of the fourth lecture tells us that that lecture was " read Oct. 17th 1761." It is contained in thirty-five small quarto volumes. The division into volumes is purely arbitrary. In many cases one volume ends, and the next begins, in the middle of a sentence. The pages are not numbered, but, on an average, there are some eighty pages to a volume. Volumes 23 and 35 have a large number of blank pages. The hand is clear and legible ; and the text at one or two points has been amended by another hand ; but these emendations are generally trivial. I should imagine that the MS. was a transcript from a good shorthand note, as the lectures, assuming they were lectures of an hour each, are too long to allow them to be taken down in longhand. Throughout the Analysis is referred to. The Analysis was evidently used by Blackstone, as he says in his Preface to it, as a syllabus. The manuscript shows that Blackstone followed very faithfully the scheme of his lectures which he published in 1759 (above 747). According to that scheme the rights of persons occupied sixteen lectures delivered between October 10 and November 1 ; the " rights of property real " occupied eleven lectures delivered between November 30 and December 17 ; the " rights of property personal " occupied six lectures delivered between January 14 and 22 ; private wrongs occupied fourteen lectures delivered between February 14 and March 6 ; and public wrongs occupied thirteen lectures delivered between March 8 and 29—in all sixty lectures. In this manuscript the later lectures are not always very clearly divided ; but I think that they work out at rather more than sixty lectures—public wrongs seem to have occupied sixteen lectures. It is possible that some of the lectures were either delivered in two parts (see vols. 16 and 17) or that they lasted for considerably more than one hour.

At the end of the manuscript Blackstone gives some advice to students of the law as to books and other methods of attaining a knowledge of the law. The passage runs as follows : " Give me leave to subjoin a little advice with a list of law books proper to be read by every gentleman after he has attended this course—viz. Finch Law—Wood's Institutes—Wright's Tenures—Duncomb's Tryal per pais—Hale's and Hawkins' Pleas of the Crown—Burn's Justice—and such as have leisure and *inclination*—Fitzherbert's Natura Brevium—Bacon's Abridgment—Gilbert, Equity Cases Abridged—Coke, Strange, Raymond, Vaughan and Peere Williams's Reports. But the student who makes the law his profession must attend to such books as treat of

that part of the law which was laid down in the 2nd and 3rd parts of this course of lectures—viz. the rights of property and the redress of civil injuries. He must study Littleton's Tenures, first by itself and then with Lord Coke's Commentary; and though he will there find much antiquated learning mixed with what is now in use, Hawkins's Abridgment of Coke and Littleton will distinguish the obsolete from the modern, and Gilbert's Tenures will explain the reasons of both. When he attends the courts at Westminster (where he should stay till the rising of the court, when matters of common practice generally arise) he had better defer taking notes for at least the first term, or till he knows what particular parts of the case [*sic*]. He must read the best reports and the most useful statutes at large—having in his mind a general map of the country he will not be a long time bewildered in the minuter districts—or take Viner's Abridgment setting out in his tract, his own judgment and sagacity will be the best guide to direct his future studies [*sic*]." The grammar at the end of this passage is dubious, but the meaning is reasonably clear. The advice given to the student is not unlike that given in Roger North's Discourse on the Study of the Laws, which was probably written at the end of the seventeenth century (vol. vi, 494-498). Indeed, at the time when Blackstone wrote, he was the only public teacher of English Law in existence, so that the reading of books and attendance on the Courts were the only ways in which a student could learn his law (above 85-88).

D

This manuscript is contained in the Hardwicke MSS. in the British Museum (Add. MSS. 36093-36101). It is a manuscript of the lectures which began October 14, 1761, and it was taken by John Edwards of Jesus College, Oxford, and Lincoln's Inn. It is entitled " An Abstract of the common law of England taken from a course of lectures read by Doctor Blackstone, Principal of New Inn Hall, and Vinerian Professor of the Laws of England in Oxford." In its text it contains references to the authorities cited by Blackstone, and further references on the opposite pages. It is probably a fair copy from the writer's notes. The lectures fill nine volumes, and each volume is divided into chapters. The first book, which corresponds to vol. 1 of the Commentaries, fills vols. 1-3, and contains sixteen chapters; the second book, which corresponds to vol. 2 of the Commentaries, fills vols. 4 and 5, and half of vol. 6, and contains twenty-three chapters; the third book, which corresponds to vol. 3 of the Commentaries, fills half of vol. 6, vol. 7, and half of vol. 8, and contains sixteen chapters; the fourth book, which corresponds to vol. 4 of the Commentaries, fills half of vol. 8, and vol. 9, and contains eleven chapters. It may be noted that in this MS., as in MS. C, Blackstone's account of equity and its relation to law is quite different from his account in the Commentaries (above 743-745). It would appear from a table of contents at the beginning of vol. 5, that the chapters of the MS. correspond to the lectures.

E

This is a manuscript belonging to Professor Temperley, whom I must thank for allowing me to examine it. It is dated February 19, 1754; it contains 151 folios; and its subject-matter comprises the greater part of book 2 of the Commentaries. It ends half-way through Lecture 14. It is obviously part of a complete MS. It begins with

the words, " Having finished rights and duties of persons, we now proceed to the rights of things—Jura rerum " ; at p. 90 there is a reference to vol. 3, p. 68 of the MS. ; and at p. 117 there is a reference to vol. 3, p. 8. The MS. is written in a good clerk's hand, but there are inter-lineations and corrections in another hand, which is very like Blackstone's. There are also additions on the opposite page by the writer of the MS. Probably it is a transcript of notes which has been corrected, perhaps by Blackstone himself. There are other noteworthy features about the MS. First, at pp. 42-43 there is a passage in square brackets, and opposite, in the hand like Blackstone's, is the word " omitted " ; and at p. 88 there is a reference in the same hand to a decision of Hil. 32 Geo. 2 in the Exchequer. It is clear therefore that these notes were inserted some time after the text had been completed. Secondly, there are other remarks in the text, not in the hand like Blackstone's, which would seem to indicate that an earlier copy of the lecture notes was used by the hearer who took these notes, and that he compiled this MS. from the earlier copy and from the notes he took at the later date. Thus at p. 81, in the course of lecture 8 on estates in remainder and reversion, there is the following note : " He introduced the doctrine of merger at the end of the last lecture (on estates less than freehold) more properly as it arises from considering estates with regard to the quantity of interest, or the majus and the minus, rather than with respect to the time of enjoyment, i.e. whether they are *in praesenti* or *futuro*." At p. 107, at the end of Lecture 10 on how the title to hereditaments may be acquired and lost, there is the following note : " In a subsequent improvement of these lectures the means of acquiring or losing a title to things real were considered together ; for gain and loss are terms of relation, and of a reciprocal nature, and by whatever method one man gains an estate, by that same method or its correlative some other man has lost it." It is a very curious MS., which presents some puzzling features.

(5) *Gibbon and Blackstone*

Gibbon's description of the state of Oxford University and Magdalen College during his brief undergraduate career is classical. But in one of the versions of his autobiography he gives reasons for thinking that, in the course of the forty years which had elapsed since that period, improvements had taken place. One of these reasons was " the merit and reputation of Sir William Scott, then a tutor in University College, and now conspicuous in the profession of the Civil Law." [1] Another was the establishment of the Vinerian Chair.

> " The Vinerian professorship," he said, " is of far more serious importance ; the laws of his country are the first science of an Englishman of rank and fortune, who is called to be a Magistrate, and may hope to be a Legislator. This judicious institution was coldly entertained by the graver Doctors who complained—I have heard the complaint—that it would take the young people from their books ; but Mr. Viner's benefaction is not unprofitable, since it has at least produced the excellent commentaries of Sir William Blackstone." [2]

So excellent did he think these Commentaries that he studied them assiduously and abstracted a part of them. In another of the versions of his autobiography he says :—

[1] The Autobiographies of Edward Gibbon, Memoir F, pp. 93-94.
[2] Ibid p. 94.

> "After a certain age the new publications of merit are the sole food of the many; and the most austere student will be often tempted to break the line, for the sake of indulging his own curiosity and of providing the topics of fashionable currency. A more respectable motive may be assigned for the triple perusal of Blackstone's commentaries, and a copious and critical abstract of that English work was my first serious production in my native language." [1]

This copious and critical abstract is an abstract, not of the whole, but only of the first volume, of the Commentaries. It is in the British Museum, catalogued as Additional MSS. 34,881, and it is contained in ff. 217-241 of the volume.

Gibbon's abstract of the Commentaries begins as follows: "Commentaries on the Laws of England, Book the 1st, by William Blackstone Esqre., Vinerian Professor etc. Oxford, 1765 in 4to pp. 473." Then follows an abstract of the Introduction, divided into chapters, and an abstract of Book I also divided into chapters. The beginning of each chapter, and the number of pages covered by it, are marked in the margin, and sometimes the titles of the chapters. The abstract is written on one side of the paper, and bound together in book form, so that the writing is on the right-hand page. On the left-hand page are "remarks," which are, I think, the most interesting part of the MS. Lord Sheffield has printed in his edition of Gibbon's miscellaneous works [2] the second paragraph of the MS., and some of the best of the remarks; but he has not distinguished between the abstract itself and the remarks—thus taking a liberty with the text somewhat analogous to the liberties which he took with the various versions of Gibbon's autobiography [3] and his letters.[4] He adds at the end of his printed version, "the remainder, being principally extracts, is omitted." This is not accurate. The remainder is not "extracts." It is a careful abstract; but, being only an abstract, it adds little to our knowledge of either Gibbon or Blackstone. For that reason, although it is, as Gibbon said, "his first serious production in his native language," I do not think that it is worth printing in its entirety. In this Appendix I print the two first paragraphs of the MS. with the remarks appended to them, and the most characteristic "remarks" appended to later paragraphs. I shall indicate which of these "remarks" have, and which have not, been previously printed by Lord Sheffield. The result will, I think, be found interesting, both because it contains the verdict passed upon the Commentaries by a man who was perhaps the most competent lay critic of his day, and also because it indicates that critic's attitude to some of the characteristic features of the English law of the period.

After the title to the MS. set out above, the MS. proceeds as follows:

Introduction

> The first Chapter, which was read at the opening of the Vinerian Lectures 25 October 1758 is employed in proving the use and importance of the study of the Laws, and in explaining how so necessary a branch of learning was so long neglected in the University of Oxford. The first of these points is too self evident

[1] Memoir C, p. 286. [2] Quarto ed. vol. iii 576-577 (1815).
[3] The Autobiographies of Edward Gibbon viii-x.
[4] R. E. Prothero, Private Letters of Edward Gibbon, Editor's Preface.

> to require much argument. It concerns every man to be acquainted with the rule to which he must conform his actions, and to have a clear idea of the whole system of duties which he is to perform and of rights which he may exact. The various relations which an English Gentleman may support either in the execution or the formation of Laws only serves to make his knowledge of them of greater consequence or his ignorance more scandalous.

This passage is not printed by Lord Sheffield. To it the following "remark" is appended on the left-hand page, which is printed by Lord Sheffield in an amended form :—

> This excellent work, of which we have only the first volume, is extracted [words missing] [1] which Mr. Blackstone read as Vinerian Professor, and may be considered as a rational System of the English Jurisprudence, digested into a natural method, and cleared of the pedantry, the obscurity, and the superfluities which rendered it the unknown horror of all men of taste.

Lord Sheffield's version reads: "This excellent work, which Mr. Blackstone read as Vinerian Professor, may be considered," etc. The similarity of this appreciation of the literary excellence of the Commentaries to the more pointed appreciation of Bentham in the preface to his *Fragment on Government* is remarkable.[2]

The second paragraph of the abstract, which has been printed by Lord Sheffield, runs as follows :—

> Unfortunately for this useful science, the foreign clergy, who poured in shoals into England after the Norman Conquest, had little relish for the old common law of this country; they had formed the design of creating upon its ruins the new system of civil and canon law which had just begun to revive in the court of Rome and the Italian Universities. The artful designs of these ecclesiastics were however constantly disappointed by the steady opposition of the Nobility and Laity, who supported the municipal law of England against these innovations; till at last, despairing of success, the clergy affected to despise what they were unable to destroy, and withdrew almost entirely from the secular tribunals. The Court of Chancery of which they obtained the direction, adopted many of the forms of the civil law, and as they were the sole masters of the two universities, they easily proscribed a science which they abhorred, and reduced the students of the common law to the necessity of erecting peculiar schools in London, and within the neighbourhood of the courts of justice. Altho' two hundred years have now elapsed since the Reformation, yet the reverence for established customs will easily account for so material a defect in our academical education not having been sooner corrected.

To this paragraph two "remarks," not printed by Lord Sheffield, are appended. The first, which refers to its statements as to ecclesiastical influence, is typically Gibbon. It is as follows: "Perhaps Mr. Blackstone might have shown the reasons of the preference which the clergy gave to the civil and canon [law] [3] and have given some instance how well they suited the Views and Interest of the Ecclesiastical Order." The second, which refers to its closing sentence, is a hit at Blackstone's reluctance to censure directly the defects of the law of his day. It is

[1] Probably "from lectures" are the missing words.
[2] For Bentham's appreciation see above 724.
[3] Word omitted in MS.

as follows: "Mr. Blackstone touches upon their neglect [i.e. the neglect of the Universities to teach English law], with the becoming tenderness of a pious son who would wish to conceal the infirmities of his parent."

Gibbon did not abstract the second chapter of the Introduction on "The Nature of Laws in General." His reason for not doing so is contained in the following "remark," which has been printed by Lord Sheffield:—

> I have entirely omitted a metaphysical enquiry upon the nature of Laws in General, eternal and positive laws, and a number of sublime terms, which I admire as much as I can without understanding them. Instead of following this high a priori road, would it not be better humbly to investigate the desires, fears, passions, and opinions of the human being, and to discover from thence what means an able legislator can employ to connect the private happiness of each individual with the observance of those laws which secure the well being of the whole.

This passage shows that Gibbon, in common with many others, agreed with Bentham's criticisms contained in his Fragment on Government; and also that he was in agreement with Bentham that the right test of the expediency of a law was the test of utility—did it make for the greatest happiness of the greatest number?

To his abstract of Chapter III of the Introduction, which deals with the laws of England, Gibbon appends a very interesting "remark" which has been printed by Lord Sheffield, with the exception of the last sentence. It illustrates Gibbon's anti-ecclesiastical bias, and indicates an attitude to the technical mysteries of the common law which is akin to Bentham's, and quite opposed to the attitude towards the British constitution and its laws expressed by Burke—a view with which Blackstone would have agreed—that "we ought to understand it according to our measure; and to venerate when we are not able presently to comprehend."[2]

The "remark" runs as follows:—

> Mr. Blackstone speaks with uncommon respect of the Old Common Law, which the generality of lawyers highly prefer to the Statute Law. He will find it however difficult to persuade an impartial reader that old customs (begun in barbarous ages, and since continued from a blind reverence to antiquity) deserve more respect than the positive decrees of the legislative power. I can indeed suspect that a general rule which is gathered only from a rude and prodigious mass of particular examples and opinions will easily acquire a prolixity and an uncertainty which will at last render the priests of Themis the sole interpreters of her oracles. I think the Clergy of all religions have as constantly preferred the traditional to the written law: and perhaps too from the same motives.

Gibbon would obviously have agreed with Bentham that legislation, which was designed (to use Bentham's words) "to pluck the mask of mystery from the face of jurisprudence,"[2] was desirable; and, like Bentham, he was convinced of the superiority of the enacted law to the unenacted law. These are therefore two other important points in which Gibbon agreed with Bentham.

[1] Appeal from the New to the Old Whigs, Works (Bohn's ed.) iii 114.
[2] Fragment on Government (Montague's ed.) 113.

The last of these "remarks" which I shall notice is a remark appended to the third chapter of Book I in which Blackstone deals with the right of succession to the Crown. It is printed (except the last part of the last sentence) by Lord Sheffield. Blackstone had said : [1]

> In the pursuit of this enquiry we shall find, that, from the days of Egbert, the first sole monarch of this kingdom, even to the present, the four cardinal maxims above mentioned have ever been held the constitutional canons of succession. It is true, the succession, through fraud, or force, or sometimes through necessity, when in hostile times the crown descended on a minor or the like, has been very frequently suspended; but has generally at last returned back into the old hereditary channel, though sometimes a very considerable period has intervened.

And then, speaking of James I's title to the throne, he said : [2]

> In his person as clearly as in Henry VIII, centered all the claims of the different competitors, from the conquest downwards, he being indisputably the lineal heir of the conqueror, and what is still more remarkable, in his person also centered the right of the Saxon monarchs, which had been suspended from the conquest till his succession.

Gibbon had very little use for legal rules based on historical deductions of this kind—to his mind they savoured too much of a semi-ecclesiastical mysticism. He said : "I wish Mr. Blackstone had talked a little less of Egbert, and of a right suspended from Edward the Confessor to Egbert. Such a suspension must be equivalent to a total extinction [3] in the opinion of all but iure divino men." [3] Here I think that Gibbon is not wholly just to Blackstone. Many rules of our constitutional law depend on deductions drawn from the events of remote periods in our history; and, though some violence may occasionally be done to pure historic truth by the use made of these events of history by the lawyers, this method of deducing the rules of constitutional law is the only method open to them. It is the small price which must be paid for that continuity of the development of our constitutional law which is its most salient characteristic, and the secret of some of its most admirable features.

Gibbon's criticism of Blackstone, which was written before Bentham's *Fragment on Government* was published, thus shows that he was in substantial agreement with Bentham on three important points. First, like Bentham, he was opposed to the mystery in which some legal doctrines had been shrouded by the lawyers. Secondly, he preferred the enacted to the unenacted law. Thirdly, he believed in testing the expediency of a law by the criterion of utility.

V

THE CONTENTS OF WYNDHAM BEAWES'S *LEX MERCATORIA REDIVIVA*

An historical deduction of trade from its original.
Of Merchants whether natives or foreigners; their character; some directions for their prudent conduct, and an abstract of the laws now in force concerning them.
Of factors, super cargoes, and agents.
Of ships, owners, captains, and sailors.

[1] Comm. i 197. [2] Ibid 208.
[3] These words are omitted by Lord Sheffield.

Of freight, charter parties, bills of lading, demorage, and bottomry.
Of ballast.
Of pilots, lodesmen, or locmen.
Of wrecks, viz. flotsam, jetsam, and lagan.
Of salvage, average, or contribution.
Of ports, havens, lighthouses, and sea marks.
Of letters of marque and reprisal.
Of privateers or capers.
Of pirates and sea-rovers.
Of convoys and cruizers.
Of captures, condemnations, and appeals.
Of bills of health and quarantine.
Of embargoes, or restraint of princes.
Of protections, passports, and safe conducts.
Of leagues and truces.
Of proclamations for war or peace.
Of the Admiralty.
Of consuls.
Of insurance.
Of arbitrators, arbitrament, arbitration bonds, and awards.
Of aliens, naturalization, and denization.
Of banks and bankers.
Of usury.
Of customs and custom house officers.
Of porters' rates for landing, etc., of some sorts of goods.
Of carts and carmen.
Of contracts, bonds, and promissory notes.
Of bills of exchange, and about the cross ones of Europe, known to foreigners under the denomination of arbitrations of exchange.
Of brokers.
Of the par of monies.
Of arbitrations.
Concerning bankruptcy.
Of the general trade of the world—*England, Wales, Scotland, Ireland.*
Of the trade between *Great Britain* and *France, Holland, Germany, Spain, Portugal.*
Great Britain's trade with *Italy* including under this denomination *Venice, Naples,* and *Sicily, Genoa, Leghorn, Ancona,* etc.
Of the trade carried on by *Great Britain* with *Turkey* and *Barbary, Africa, Asia, America.*
Of the *South Sea* Company.
Of the *Hudsons'-Bay* Company.
Of *Carolina's* general trade.
The general trade of *Virginia, Maryland, New York, Pensilvania,* the *Jerseys,* and *New England, Nova Scotia, Georgia, Barbadoes, St. Christopher, Nevis* (or *Mavis*), and the other Carribee islands, *Jamaica,* the *Lucayos* or *Bahama* isles, the *Bermudas* or *Summer* islands, *Newfoundland.*
An account of the trade between *Great Britain* and *Muscovy,* carried on by the *Russia* Company.
Of the trade between *Great Britain, Denmark,* and *Norway, Sweden, Poland, Prussia,* and the *Austrian Netherlands.*
Of the products, manufactures, and trade of *France.*
Of the trade of *Spain, Portugal,* and their *African* Company, *Italy.*
Of the *Levant* trade and that on the coast of *Barbary.*

Of the trade of the *Archipelago*.
Of the trade of *Africk*.
The trade of the *Canary* Isles.
Of the trade of *Asia*.
Of the trade of the Gulf of *Persia*.
Of the trade of *Sumatra*, *Borneo*, *Crimati*, or *Crimatia*.
Of the *Molucca*, or *Molucque* islands.
Of the isles of *Banda*.
Of *Amboina*.
Of the *Phillipines*, or *Manillas*.
Of the isles of thieves, or *Ladrones*.
Of the isles of *Japan* or *Japon*.
Of the trade of *Jesso*.
Of the trade on the coasts of *Spanish America* in the north sea.
Of the commerce of the *Spanish American* coasts in the south sea.
Of the trade of the *French America*.
Commerce of the *Portugese America*.
Of the trade of *Holland*.
Concerning the trade of the *North* and the *Baltick* Sea.
Of the trade of *Denmark*.
Concerning the *Sound*.
Of the trade of *Norway*.
Of the trade of *Courland*, *Prussia*, and *Pomerania*.
Of the commerce of *Livonia*, and its principal cities.
Of the commerce carried on at *Archangel*, and other places of *Muscovy*.
Of the trade of *Sweden*.
Of the commerce of *Switzerland* and *Geneva*.
Of the weights used throughout *Great Britain*.
Of those used in *France*, *Holland*, *Coningsberg*, *Dantzick*, *Elbing*, *Stetin*, *Lubeck*, *Breslau*, *Bremen*, *Naumbourg*, *Erfurt*, *Berne*, *Cologne*, *Ghent*, *Brussels*, *Malines*, *Bruges*, *Lisle*, *St. Malo*, *Bayonne*, *Genoa*, and *Rome*, *Leghorn*, *Florence*, *Lucca*, *Palermo*, *Venice*, *Bologna*, *Bergame*, *Naples*, *Smyrna*, *Constantinople*, and *Alleppo*, *Tripoli*, *Seyda*, *Alexandria*, and *Grand Cairo*.
A table of the agreement which the weights of the principal places in *Europe* have with each other.
Ditto of the dry measures for corn.
A table of the agreement of diverse measures with those of *Amsterdam*, *Paris*, and *Bourdeaux*.
An abstract of the correspondent weights and measures of the different species of corn in *Flanders* and *Germany*.
Ditto of long measures.
A table of the agreement which the long measures of the chief places in *Europe* have with each other.
The measures of *France* and other countries reduced into feet, inches, and lines.
The correspondency of the length of a foot in divers places.
Of dry and liquid measures.
Of coins, both real and imaginary, in all countries.
An alphabetical list of the coins, weights, and measures of *Asia*, etc.

INDEX

A

ABRIDGMENTS,
alphabetical arrangement, 173, 174.
Bacon, 169, 170.
Coke's Institutes, 173.
Comyns' Digest, 168, 169, 171.
Cowell's *Interpreter*, 175, 176.
D'Anvers, 162, 163, 164, 165.
Equity Cases Abridged, 171, 172.
Hughes, 162.
Jacob, 162.
Justinian's Code and Digest, 173.
Nelson, 162, 164.
Petersdorff, 171.
Rolle, 162, 163, 167, 168.
Sheppard, 168.
Viner, 163-168, 178.
ACHERLEY, ROGER,
Britannic Constitution, 339, 340, 341.
ACT OF GOD,
loss from, 519 *n.*
Actions on the Case for Tort,
published in 1720, 391.
ADMIRALTY AND PRIZE LAW,
literature of, 626 *sqq.*
ADMIRALTY, COURT OF,
duties of, 12.
Jenkins, Sir L., decisions of, 652-658.
Judges of the Court,
Exton, John, 1649-1665, 646.
Exton, Thomas, 1677, 646.
Hay, Sir George, 1773, 669, 672.
Hedges, Charles, 1689, 662, 669.
Jenkins, Sir Leoline, 1668-1685, 647, 648.
Lloyd, Richard, 1685-1686, 646.
Marriott, Sir James, 1778, 674.
Newton, Sir Henry, 1714, 662, 663.
Robinson, Christopher, 1828, 105, 145.
Penrice, Sir Henry, 1715, 669, 671.
Salusbury, Sir Thomas, 1757-1773, 646, 669, 671.
Stowell, Lord, 1798-1828, 676.
jurisdiction,
conflict with other Courts, 697, 699.
criminal cases, 678, 679.
early limitation of, 692.
Prize, 665, 669, 670.
procedure, 683.
restoration of, 693.
ADMIRALTY, COURT OF (*cont.*)—
King's and Lord High Admiral's advocates, 11.
Prize decisions, 673, 674, 675, 676.
procedure, 678, 681, 683.
great differences from that of Equity and Common law Courts, 677, 694.
ransom contracts, decisions on, 693.
Reports in, 105, 144, 145, 665.
seamen's wages, cases concerning, 692.
ADVOCATE-GENERAL,
Precedence and Duties of, 4, 6, 7, 9.
ADVOCATES,
distinguished names among, 646, 647.
Ecclesiastical and Admiralty Courts, 4, 5, 7, 50, 51.
qualifications, 639.
ADYE, S. P.
Treatise on Courts Martial, 347.
AFFIDAVITS,
book on attorney's and solicitor's practice, 360.
ALLEGIANCE,
residence abroad does not affect, 651.
ALLEN, DR. C. K.,
case law system, 160 *n.*, 161.
ALL SOULS COLLEGE,
Blackstone's work as bursar, 718, 719.
AMERICA, WAR WITH,
Prize decisions arising out of, 674.
Andrews v. *Powys*,
jurisdiction, uncertainty of, 695.
ANGLO-NORMAN LAW,
Houard's Traités sur les Coutumes Anglo-Normandes, 403.
ANGLO-SAXON LAWS AND CUSTOMS,
books, on, 403.
ANNUITIES,
books on law of, 397, 398.
ANSTIS, JOHN,
Curia Militaris, 629, 630.
ANTIQUARIAN SOCIETY, THE,
some account of, 408, 409.
APSLEY, LORD,
see Bathurst, Henry.
ARBITRATION,
books on, 392, 393.
ARCHES COURT,
Deans of the Arches, 646, 648, 663, 665, 666, 673.

ARDEN, SIR RICHARD PEPPER,
career of, 328, 329.
Chief Justice of the C.P., 329.
Master of the Rolls, 320, 327, 328, 329.
Pitt's friendship with, 329.
Thurlow's dislike of, 327, 328, 329.
ASHBURTON, LORD,
see Dunning, John.
ASHHURST, SIR WILLIAM HENRY,
career of, 486, 487.
decisions, 487, 488.
judge of the King's Bench, 1770-1799, 486-488.
ASSIGNMENT
of choses in action, 270.
ASTON, RICHARD,
judge of the King's Bench, 1765-1778, 484, 485.
ASTRY, SIR JAMES,
General Charge to all Grand Juries, 334.
Attorney and Solicitor's Companion,
book on affidavits, 360.
ATTORNEY-GENERAL,
Precedence of, 4, 6, 7.
ATTORNEYS,
origin and position, 8, 9.
Practical books, 359.
And see Solicitors.
ATTORNEYS-GENERAL,
Lechmere, Nicholas, 1718-1720, 460.
Murray, William, 1754-1756, 468.
Northey, Sir Edward, 1701-1707, 1710-1714, 460.
Norton, Sir Fletcher, 1763, 327, 560.
Pratt, Charles, 1757, 305.
Raymond, Robert, 1720, 437.
Ryder, Dudley, 1737, 446.
Thurlow, Edward, 1771, 317.
Wallace, James, 1780, 1783, 564.
Wedderburn, A., 1777, 572.
Attorney's Pocket Companion,
an attorney's practice book, 359, 360.
Attornies and Solicitors, Law of,
book on attorney's qualifications, power, authority and costs, 360, 361.
AUCKLAND, LORD,
see Eden, William.
AUSTIN, JOHN,
Blackstone, criticism of, 731.
helped to clarify ideas towards law reform, 736.
AYLIFFE, JOHN,
career and character, 610, 611.
works by,
New Pandect of Roman Civil Law, 641, 642.
Parergon Juris Canonici Anglicani, 610-612.

B

BACON, FRANCIS,
Principall Rules and Maxims of the Common Lawes of England, 189.
BACON, JOHN,
Liber Regis vel Thesaurus Ecclesiasticarum, 624 *n.*
BACON, MATTHEW,
The Compleat Arbitrator, 393.
BAGEHOT, WALTER,
French Revolution, terror of; delayed Parliamentary reform, 735.
BAILMENTS,
Jones's Essay on the Law of, 393, 394.
BALLOW, HENRY,
Treatise of Equity,
account of, 191, 192, 222 *sqq.*
BANK NOTES,
title of *bona-fide* holder, 529.
BANKRUPTCY,
books on, 387, 388.
cases on law of, 541.
BAR,
Solicitors, relations with; supervision of Society of Gentlemen Practisers, 73.
BAR, CALLS TO THE,
see Inns of Court.
BARNARD'S INN,
attached to Gray's Inn, 41, 42 *n.*, 43 *n.*, 44, 45.
BARRINGTON, DAINES,
career, 401.
Johnson, Dr., friendship with, 401.
Observations upon the Statutes, 296, 400, 401.
BARRISTERS,
See Legal Profession.
BARTON, CHARLES,
Historical Treatise of a Suit in Equity, 181.
BASTARDY,
Brydall's *Lex Spuriorum*, 398.
BATHURST, HENRY (LORD APSLEY),
Career and character of, 313, 314.
Law Relative to Trials at Nisi Prius, 354, 366.
Lord Chancellor, 1771-1778, 313.
Lord President of the Council, 314.
BAYLEY, SIR JOHN (MR. JUSTICE),
Summary of the Law of Bills of Exchange, 389, 390.
BEAWES, WYNDHAM,
Lex Mercatoria Rediviva, 384-385.
contents of—*Appendix*, 754.
BELLERS, FETTIPLACE,
The Elements of Universal Law, 645, 646.

BENTHAM, JEREMY,
Bever's *Discourse*, on, 645 *n*.
Blackstone's Commentaries, criticism of, 727, 728, 730, 731, 732, 733.
Comment on the Commentaries, 731, 732.
Fragment of Government, 731, 732, 733, 736, 752.
law reform, help in bringing about, 736.
Mansfield, in praise of, 554, 555, 558.
BETTESWORTH, DR. JOHN,
Dean of the arches, 1710, 646, 665
decisions, 665, 666.
judge of the Prerogative Court, 1714, 646, 665.
lease of Doctors' Commons, case concerning, 665.
BETTESWORTH, JOHN, JUNIOR,
judge of the Consistory Court, 646.
BEVER, DR. THOMAS,
career of, 644.
Discourse on the Study of Jurisprudence and the Civil Law, 644, 645.
BILLS OF EXCHANGE,
acceptance of, 531.
books on, 389, 390.
BILLS OF LADING,
cases on, 533.
BLACKERBY, SAMUEL,
Justice of the Peace, his Companion, 334, 335.
BLACKSTONE, SIR WILLIAM,
All Souls College, fellowships for founder's kin, 705, 709.
work as bursar, 718, 719.
Architecture, knowledge of, 704.
Bentham's hostility to, 730, 731.
career, 703-709, 720.
character, 708, 718.
Codrington Library, work for, 705, 719.
Commentaries—see Blackstone's Commentaries.
Common Pleas, judge of, 706.
death, 708.
decisions, 707.
ecclesiastical courts, relations with courts of equity and common law, 678.
equity: term used in two different senses, 591-593.
equity, treatment of in his lectures, *Appendix*, 743.
Gibbon and, *Appendix*, 750.
Gilbert's book on Common Pleas Practice, 352 *n*.
King's Bench, Judge of, Feb.-June, 1770, 485, 706, 707.
law and equity, relations between, 590, 593, 594.
reasons for rejection of views, 595-601.
BLACKSTONE, SIR WILLIAM—law and equity (*cont.*)—
separation of: results of rejection of views on, 601 *sqq*.
law reform, attitude to, 550.
learning and intellectual qualities, 717, 718.
lectures, 706, 720, 721.
first lecture on English law, 91.
inaugural lecture as Vinerian professor of law, 96.
manuscripts of, *Appendix*, 747.
pre-Vinerian, advertisement of, *Appendix*, 745.
legal education, attempt to establish system of, 91.
New Inn Hall, Principal of, 706.
Oxford, activities at, 705.
Parliamentary reform, in favour of, 729 *n*.
prerogative, definition of, 456.
reports by, 133, 134, 707.
teaching the law, 96-99.
Toleration Act, view of: Dr. Furneaux's criticism, 714.
University Press, Oxford, efforts for improvement of, 719.
Vinerian professor of English law, 92, 95, 706.
works,
Analysis of the Laws of England, 92, 709.
Commentaries—see Blackstone's Commentaries.
constitutional law, book on, 342.
Dissertation on the accounts of All Souls College, 718, 719.
Elements of Architecture, 704.
Essay on Collateral Consanguinity, 705, 709.
Great Charter and Charter of the Forest, 710.
Lawyer's Farewell to his Muse, 704.
Observations on the Oxford Press, 710.
BLACKSTONE'S COMMENTARIES,
America, popularity in, 712, 713 *n*., 726.
authority, whether a book of, 717.
Bentham's criticism, 727, 728, 730, 731, 732, 733.
best history of English law from Edward I.'s reign, 412, 415.
Bracton's treatise, comparison with, 702.
Christian's edition, 715.
composition of, 721 *sqq*.
contents, 711, 712.
criticism of various laws in, 728, 729.
Dicey on, 715, 724.
editions of, 712, 713, 714, 715.
general praise of, 716.
Gibbon's criticism, 727, 728, 729, 730.

BLACKSTONE'S COMMENTARIES (*cont.*)—
Glasson's criticism of the philosophical part of the work, 733.
Greatest common law book, 331.
Hammond's American edition, 712 *n.*, 725.
legal classic, reasons for acceptance as, 717 *sqq.*
Lévy-Ullmann's, Prof., praise of, 726.
Mansfield's good opinion of, 476.
as a student's book, 418.
Mansfield's influence on, 723.
Montesquieu's theory of separation of powers, attitude to, 734, 735.
origin of, 720 *sqq.*
place of in the study of English law, 418, 419, 420, 421, 423, 431, 462, 463.
Pollock, Sir F., suggestion for Clarendon Press edition, 736 *n.*
Priestley's attack on, 713.
publication of, 706.
recognized classic in England and the United States, 736.
Redesdale's denial that they were a book of authority, 717.
Sedgwick's criticism, 727 *n.*
Sovereignty, doctrine of, 734.
Taylor Coleridge's opinion, 715, 724.
BLOUNT, W.,
Law Dictionary, 175, 177.
BOARD OF TRADE,
Standing Counsel appointed, 10, 11.
BOHUN, WILLIAM, works by,
Cursus Cancellariæ, 180, 185.
Declaration and Pleadings, 358.
Institutio Legalis, 424.
The Law of Tithes, 621.
BOOTE, RICHARD,
Historical Treatise of an Action or Suit at Law, 411.
BOOTH, GEORGE,
Law of Real Actions, 367, 368, 429.
BOSCOWEN, WILLIAM,
Treatise on Convictions on Penal Statutes, 363.
BOWEN, LORD,
describes initiation into study of the law, 101 *n.*
BOYD, ROBERT,
Office Powers and Jurisdiction of Justices of the Peace, 335.
BRACTON,
comparison of his treatise with Blackstone's *Commentaries*, 702.
BREWSTER, SAMUEL,
Collectanea Ecclesiastica, 625.
BROOM, H.,
Legal Maxims, 189.
BROWN[E], WILLIAM,
Praxis Almæ Curiæ Cancellariæ, 179, 180.
Treatise on Recoveries upon Writs of Entry, 377, 378.
BRYDALL, J.,
Lex Spuriorum, 398, 399.
Non compos mentis, 398, 399.
BULLER, SIR FRANCIS (MR. JUSTICE),
character, 488, 489.
decisions, 282, 327, 489-492.
judge of the King's Bench, 1778-1794, 488-492.
works,
Nisi Prius, 354, 366.
Trials at Nisi Prius, 314.
BURGES, J. B.,
Considerations on the Law of Insolvency, 388.
BURKE, EDMUND,
law reform, attitude to, 550, 554.
Power of the Crown, *dictum* on, 729.
BURLAMAQUI, J. J.,
Principles of Natural and Politic Law, 642, 643.
BURN, REV. RICHARD,
works by,
Ecclesiastical Law, 612, 613.
History of the Poor Law, 338, 339.
Justices of the Peace, 332-334, 335, 339, 429.
BURROW, SIR JAMES,
career of, 110.
Fitz-Gibbon's reports, opinion of, 138, 139.
BURY, THOMAS,
Chief Baron, 1716-1722, 455.
BUTLER, CHARLES,
career of, 372, 373.
Impressment, tract on, 347.
law and equity, rules of, 590.
Loughborough, opinion of, 574, 575.
Mansfield's decisions, on, 554.
works by,
Coke upon Littleton, edited an edition of, 371, 372, 373, 410, 429.
Fearne's *Contingent Remainders*, 6th to 9th edition ed. by, 375.
Reminiscences; accounts of Mansfield, 464 *n.*, 467 *n.*, 468, 475.
BYNKERSHOEK, CORNELIUS VAN,
De Foro Legatorum, 634.
Quaestiones Juris Publici, 634.
translations of, 637, 638.

C

CAMBRIDGE UNIVERSITY,
examinations, farcical nature of, 84.
CAMDEN, EARL,
Attorney-general, 305.
career of, 304.

CAMDEN, EARL (*cont.*)—
Chatham, lifelong friendship with, 304, 305.
Chief Justice of C.P., 1761, 306.
death of, 308.
decisions, 308, 309.
Lord Chancellor, 1766-1770, 306.
Fox's India Bill, opposed to, 307.
Fox's Libel Act, support of, 305, 307, 308.
Hamilton v. *Douglas*, speech in, 309, 310.
jury: general verdict, support of principle, 305.
President of the Council, 307.
Shebbeare case, appearance in, 305.
CAMPBELL, LORD,
Thurlow's support of divorce bill in House of Lords, account of, 321, 322.
CAREW, THOMAS,
Historical Account of the Rights of Elections, etc., 346.
CARTER, SAMUEL,
Legal Provisions for the Poor, 338.
Lex Custumaria, 380.
Lex Vadiorum: the Law of Mortgages, 381, 382.
CASE LAW,
system of, 146-162.
CENTRAL GOVERNMENT,
literature concerning, 339 *sqq.*
CHALMERS, GEORGE,
Opinions of Eminent Lawyers, etc., 349.
CHANCELLORS,
see Lord Chancellors.
CHANCERY, COURT OF,
Business of the Court during Chancellorship of Hardwicke and Eldon, *Appendix*, 742.
clerical staff, reorganization of, 58.
jurisdiction, concurrent, 698, 699, 700.
conflicts of, 696, 697, 698.
six or sixty clerks, 56, 57.
And see Equity.
CHARLES II,
Jenkins, Sir L., appreciation of fine character of, 660 *n.*
CHATHAM, EARL OF,
Camden, life-long friendship with, 304, 305.
Thurlow's strained relations with, 320.
CHETWYND, J.,
Treatise upon Fines, 378.
CHIEF BARONS OF THE COURT OF EXCHEQUER,
list of (1700-1756), 431 *n.*, 455.
Bury, Thomas, 1716-1722, 455.
Comyns, John, 1738-1740, 455.
Dodd, Samuel, 1714-1716, 455.
Eyre, Sir James, 1787-1793, 565-568.
Eyre, Sir Robert, 1723-1725, 448, 455.
CHIEF BARONS OF THE COURT OF EXCHEQUER (*cont.*)—
Gilbert, Jeffrey, 1725-1726, 140, 455.
Montague, James, 1722-1723, 455.
Parker, Thomas, 1742-1772, 455, 456.
Pengelly, Thomas, 1726-1730, 455.
Probyn, Edmund, 1740-1742, 456.
Reynolds, James, 1730-1738, 456.
Skynner, John, 1777-1787, 564.
Smythe, Sidney, 1772-1777, 564.
Ward, Edward, 1695-1714, 455.
CHIEF JUSTICES,
list of (1700-1756), 431.
Arden, R. P. (Common Pleas), 1801-1804, 329.
Camden, Lord (Charles Pratt), (Common Pleas), 1761, 306.
De Grey, William (Lord Walsingham), (Common Pleas), 1771-1780, 568, 569.
Eyre, James (Common Pleas), 1793-1799, 566.
Eyre, Sir Robert (Common Pleas), 1725-1736, 448, 455.
Hardwicke, Lord, 1733, 243, 432.
Kenyon, Lord, 1788-1802, 328, 576-583.
King, Peter (Common Pleas), 1714-1725, 211, 447.
Lee, Sir William, 1737-1754, 442-446.
Loughborough, Lord (Common Pleas), 1780-1793, 569-576.
Mansfield, Lord, 1756-1786, 472 *sqq.*
Parker, Thomas (Lord Macclesfield), 1710-1718, 204, 432.
Pratt, John, 1718-1725, 432-437.
Raymond, Robert, 1725-1733, 437-442.
Reeve, Thomas (Common Pleas), 1736, 448.
Ryder, Dudley, 1754-1756, 446, 447.
Trevor, Thomas (Common Pleas), 1701-1714, 447, 448.
Willes, John (Common Pleas), 1737-1760, 447, 448.
Wilmot, John Eardley (Common Pleas), 1766-1771, 480.
CHITTY, JOSEPH,
Treatise on the Laws of Commerce, etc., 386, 387.
CHOSES IN ACTION,
assignment of, 270.
CHURCH,
divine origin for ecclesiastical authority and jurisdiction, claim for, 609, 610.
offences, ecclesiastical, 691.
rates, 690.
CINQUE PORTS,
Prize jurisdiction ceased in 1702, 671 *n.*
Warden's power to seize goods of person trading with enemy, 671.

CIVIL LAW,
place of learning and practice of civilians in English legal system, 677 *sqq.*
contribution made by civilians, 685 *sqq.*
Roman, reception of, 161.
CLARKE, THOMAS,
Career of, 246.
Fleta, edited an edition of, 246.
Master of the Rolls, 1754-1764, 245, 246.
CLEMENT'S INN,
attached to the Inner Temple, 41, 42 *n.*, 43 *n.*
CLERKE, FRANCIS,
Practice of the Court of Admiralty, 614, 615, 628, 629.
Clerke's English Tutor,
an attorney's practice book, 360.
Clerk's Instructor in the Ecclesiastical Courts,
contents of, 618.
CLIFFORD'S INN,
attached to the Inner Temple, 41, 42 *n.*, 44, 45.
CLIFT, HENRY,
A New Book of Declarations, Pleadings, etc., 356.
COBBETT, WILLIAM,
translation of de Martens' *Précis du droit des Gens Moderne de l'Europe*, 638.
COCKBURN, WILLIAM B.,
Clerk's Assistant in the Practice of the Ecclesiastical Courts, 619.
Codex Juris Ecclesiastici Anglicani,
see Gibson, Edmund.
COKE, SIR EDWARD,
authority of decisions, 151.
Compleate Copyholder, The, 370.
Coke upon Littleton,
Hargrave and Butler's ed. of 371, 372, 373, 410.
COLERIDGE, JOHN TAYLOR,
Blackstone's *Commentaries*, opinion of, 715, 724.
COLLET, HENRY,
Treatise on the Laws of England; concerning Estates in Lands, 380.
COLONIAL GOVERNMENT,
Acts and Ordinances, books of, 348.
Adam Smith's *Wealth of Nations*, 349.
Chalmers' *Opinions*, 349.
Pownall's *Administration of the Colonies*, 349.
Reeve's History of the Government of Newfoundland, 350.
Stoke's *Constitution of the British Colonies in North America and the West Indies*, 349, 350.
COLONIAL GOVERNMENT (*cont.*)—
Trott's *Laws of the British Plantations and America relating to the Church*, 349.
Commentaries,
see Blackstone's *Commentaries*.
COMMERCIAL AND MARITIME LAW,
Bank notes, 529.
bills of lading, 533.
books on, 383-391.
Continental rules, adaptation of, 525, 526.
decisions on, 524 *sqq.*
Hardwicke, Lord, decisions, 282, 283.
Insurance, contract of, 525, 528.
Jenkins, Sir L., opinions on points of, 656, 657.
marine insurance policies, definitions, 532, 533.
mercantile custom, evidence of, 527, 528.
negotiable instruments, 529.
partnership, 531.
patent law, 532.
principal and agent, 532.
COMMON LAW,
Courts, conflicting jurisdiction with other Courts, 695 *sqq.*, 699.
development of the, 330 *sqq.*
Equity and, 259.
future development of the, Mansfield's influence on, 549 *sqq.*
literature of the, 331 *sqq.*
Blackstone's *Commentaries*, 331.
Mansfield's great influence on the, 477.
procedure and pleading, relation to that in ecclesiastical Courts, 678-685, 694.
COMMON PLEAS,
Chief Justices (1700-1756), list of, 431 *n.*
Chief Justices,
Arden, R. P., 1801-1804, 329.
Camden, Lord (Charles Pratt), 1761, 306.
De Grey, William (Lord Walsingham), 1771-1780, 568, 569.
Eyre, James, 1793-1799, 566.
Eyre, Robert, 1725-1736, 445, 448.
King, Peter, 1714-1725, 211, 447.
Loughborough, Lord, 1780-1793, 569-576.
Reeve, Thomas, 1736, 448, 455.
Trevor, Thomas, 1701-1714, 447, 448.
Willes, John, 1737-1760, 132, 447, 448.
Wilmot, John Eardley, 1766-1771, 480.
decisions in Court of, 449-454.
Judges of,
Blackstone, Sir W., 1770, 706, 707.

COMMON PLEAS—Judges of (*cont.*)—
Park, James Alan, 1816, 390.
Yates, Joseph, 1770, 482, 483.
jurisdiction of, 448.
practice and procedure, books on, 351, 352, 353, 357, 358.
COMPARATIVE LAW,
Study of, 161.
Compleat English Copyholder,
Alphabetical Digest of the law, 381.
COMYNS, JOHN,
Chief Baron, 1738-1740, 455.
Digest, Kyd's continuation of, 400.
CONSET, HENRY,
Practice of the Spiritual or Ecclesiastical Courts, 615, 616.
CONSIDERATION,
see Contract.
CONSISTORY COURT,
judge of, 145, 646.
CONSTABLES,
inefficiency of, 336.
Ritson's *Office of Constable*, 336, 337.
Saunders Welch's book on, 336.
CONSTITUTIONAL LAW,
literature of:
Acherley's *Britannic Constitution*, 339, 340, 341.
Blackstone's book on, 342.
De Lolme's *Constitution of England*, 343, 344.
Higden's *English Constitution with respect to the Sovereign authority of the Prince, etc.*, 345.
Jacob's *Lex Constitutionis*, 339, 340.
Philipp's *Fundamental Laws and Constitutions of Seven Potent Kingdoms, etc.*, 342.
Plowden's *Jura Anglorum*, 347.
Sullivan's *Historical Treatise of the Feudal Law and Constitutional Laws of England*, 342, 343.
Mansfield's decisions on, 510-512.
CONTINGENT REMAINDERS,
Fearne's book on, 374, 375.
CONTRACT,
Act of God, loss from, 519 *n.*
concurrent conditions, 520.
Consideration, Mansfield's attempt to recast doctrine of, 517, 518.
first book on law of, 392.
indebitatus assumpsit, 520.
infants, capacity of, 518.
law of: Mansfield's decisions, 517-521.
part performance, 277.
penalty and liquidated damages, 519, 520.
specific performance, 277, 290.
unlawful, 518.
wagers, legal and illegal, 520, 521.
CONVERSION,
doctrine of, 270.
trusts for, 324.
CONVEYANCING,
books on, 367, 375.
status of, 26, 27.
COOKE, SIR GEORGE,
Rules, Orders, etc., in the Common Pleas, 350, 351.
COOKE, JOHN,
Advocate-General, 663.
Dean of the Arches, 663.
COPYHOLDS,
books on, 380, 381.
COPYRIGHT,
decisions on, 283, 309, 313, 314.
Mansfield's decisions on, 559.
CORONERS,
Umfreville's *Lex Coronatoria*, 330.
CORPORATIONS,
Kyd's book on, 400.
COSTS,
Sayer's *Law of Costs*, 356.
taxation of and lien for, 56, 60, 61.
COURTS LEET,
Ritson's books on, 337, 338.
COURTS MARTIAL,
Adye's *Courts Martial*, 347.
COWELL, J.,
Interpreter, 175, 176.
COWPER, WILLIAM,
Gordon Riots, lines on, 474.
COWPER, WILLIAM, EARL,
account of, 195.
first Lord Chancellor, 196.
judgments, 199, 200.
King's chief adviser, 196.
re-appointed under George I, 196.
resigned, 1718, 197.
CRIMINAL CONVERSATION,
damages, question of, 523.
CRIMINAL LAW,
accomplice: King's evidence—right to pardon, 514.
Mansfield's decisions, 513, 514.
public mischief, 513, 514.
CRIMINAL LAW AND PROCEDURE,
books on, 361-365.
treason, tracts on, 362, 363.
CROMPTON, GEORGE,
Crown Circuit Companion, 353, 354.
Practice of the Courts of King's Bench and Common Pleas, 352, 353.
CROWN LAW,
Tremaine and Rice's collection of precedents relating to, 363.
CUNNINGHAM, T.,
works by
Historical account of the Rights of Election, 346.
History of the Customs, 348.
Law of Bills of Exchange, 389.
Law of Simony, 398.
CUSTOMS,
Cunningham's *History of the Customs*, 348.

D

DALTON, JOHN,
The Compleat Sheriff, 335, 336.
DAMAGES,
criminal conversation, actions for, 523.
excessive, 523.
liquidated, and penalty, distinction between, 519, 520.
Sayer's book on, 394.
DARBY, JOHN,
State trials, first idea of reports of, 128.
DAY, JOSEPH,
Solicitors, scheme for a Governing Corporation, 64, 65, 82.
Dean of St. Asaph's Case,
Mansfield's judgment in, 513.
De Contumace Capiendo,
writ, 659.
De excommunicato capiendo,
writ, 659, 680.
DEFAMATION,
cases on law of, 513, 522.
And see Libel.
DEGGE, SIR SIMON,
The Parson's Counsellor, 620, 621.
DE GREY, WILLIAM, C.J. of the C.P. (Lord Walsingham),
career of, 568,
Chief Justice of the C.P., 1771-1780, 568, 569.
decisions, 568, 569.
Eldon's opinion of, 568, 569.
DE LOLME, JOHN LOUIS,
career of, 343, 344.
Constitution of England, 343, 344.
DE MARTENS, E. F.,
Horne's translation of essay on privateers, captures and recaptures, 638.
Précis du droit des Gens Moderne de l'Europe, 635, 637.
Cobbett's translation of, 638.
DENISON, THOMAS,
Judge of the King's Bench, 1741-1765, 478, 479.
DICEY, ALBERT VENN,
amendment of the law, 735.
Blackstone's and Stephen's *Commentaries*, views on, 715, 724.
law, teaching of the, 101.
DICKENS, CHARLES,
Doctors' Commons Court: described in *David Copperfield*, 49, 50, 51, 605.
Newgate, 'a vile place,' 456 *n*.
DIGBY, JOHN,
see Wicquefort, A. de.
DISNEY, JOHN,
View of Ancient Laws against Immorality and Profaneness, 622.
DISTRESS AND REPLEVIN,
Gilbert's *Law and Practice of Distress and Replevin*, 355, 371.
DIVORCE,
suits for, 686.
Doctor and Student,
St. Germain's book, 188, 223, 418, 422.
DOCTORS' COMMONS,
abolition of, 684, 701.
College dissolved, 49.
Court of: Dickens's description, 49, 50, 51, 605.
formation and purpose of, 46, 47.
Incorporation of College, 48.
lease of site, 47, 48.
case concerning (*Bettesworth* v. *Dean of St. Paul's*), 665.
prominent members, 639.
DOCTORS OF CIVIL LAW,
no examination for, 83, 84.
position of, 7, 83, 84.
DODD, SAMUEL,
Chief Baron, 1714-1716, 455.
DOMAT,
Les Lois Civiles dans leur Ordre Naturel, Wood's translation, 427.
Donatio mortis causa,
Hardwicke, Lord, decisions, 280.
DOUGLAS, S. (Lord Glenbervie),
History of Cases of Controverted Elections, 346.
DUCHY OF CORNWALL,
Attorney-General for, 10.
DUCHY OF LANCASTER,
Attorney-General for, 10.
DUNNING, JOHN (Lord Ashburton),
ability, 562, 563, 564 *n*.
career of, 562, 563.
solicitor-general, 1768-1770, 562.

E

ECCLESIASTICAL COURTS,
Blackstone on relations with courts of equity and common law, 678.
Chancery, Court of, concurrent jurisdiction with, 700.
church rates, 690.
conflicting jurisdiction with other courts, 695 *sqq*.
evidence and pleadings, 679, 680, 681, 682.
jurisdiction: *Middleton* v. *Crofts*, 242.
King's proctor, duties of, 12.
matrimonial causes, 685, 686.
offences, 691.
procedure, 678 *sqq*.
procedure, great differences from that of equity and common law courts, 677, 694.
purely ecclesiastical causes, 689-692.
testamentary causes, 686-689.
testamentary jurisdiction, 619.
tithe cases, 690.

ECCLESIASTICAL LAW,
books on, 607 *sqq.*
Excommunication: Sir L. Jenkins's advice, 659.
Jenkins, Sir L., opinions on, 658.
ECTON, J.,
Liber Valorum et Decimarum, 624 *n.*
Thesaurus Rerum Ecclesiasticarum, 624 *n.*
EDEN, ROBERT,
Jurisprudentia Philologica, etc., 640, 641.
EDEN, WILLIAM (Lord Auckland),
Principles of Penal Law, 364, 365.
EJECTMENT,
actions of, 516, 517.
Gilbert's book on, 355.
ELDON, LORD,
advice to a law student, 87, 88.
Chancery, Court of, business during chancellorship of, *Appendix*, 742.
delays in Court:
practice and procedure, defects in, responsibility for, 294.
Kenyon, Lord, opinion of, 328 *n.*
reports, publication encouraged by, 145.
ELECTIONS,
Parliamentary, books on, 346.
English Pleader, The; A Select Collection of Various Precedents on Actions, etc., 356.
EQUITY,
acts *in personam*: *Penn* v. *Lord Baltimore*, 264.
administration of assets, 279.
Ballow's views,
Charitable trusts, 226.
Ecclesiastical and maritime followed in appropriate cases, 225.
equitable doctrine based on general principle of acknowledged truth, 223.
equitable estate tail, alienation of, 224.
fraud and breach of trust, 234, 235, 236.
heir, disinheritance of, 232.
limitations upon power of Equity to interfere with the law, 227.
trusts and trustees, 225, 229, 230.
Blackstone uses term in two different senses, 591-593.
Blackstone's treatment of, in his lectures, *Appendix*, 743.
bona vacantia, 323.
books on, 179-193, *see also under* authors' names.
Chancellor's conscience, Lord Nottingham on, 228.
commercial cases, 282, 283.
common law and, 259.
EQUITY (*cont.*)—
conscience in administration of, 262, 264.
contracts, part performance of, 277.
contracts, specific performance of, 277, 290.
conversion, doctrine of, 270.
conversion, trusts for, 324.
copyright cases, 283, 309, 313, 314.
courts of, conflicting jurisdiction with other courts, 695 *sqq.*
procedure and pleading, relation to that in ecclesiastical courts, 678-685, 694.
delays in litigation, 289, 290, 291.
development of, 178, 179.
donationes mortis causa, 280.
equitable estates, 265, 266.
equitable remedies wider than those of the common law, 546, 547.
escheat, law of, 301-303.
escheat; trustees taking beneficially on disappearance of c.q. trusts, 301.
estoppel by conduct, 504.
evidence, law of, 280, 281.
family law, 273 *sqq.*
Hardwicke, Lord, contribution to modern system of, 237 *sqq.*, 257 *sqq.*
contribution to substantive principles of, 258 *sqq.*
decisions, 256 *sqq.*
no decree contrary to an ascertained principle, 261.
infants,
contracts for their benefit, 275.
marriage of, 273, 274.
relief from contracts, 274.
intention of parties the real guide, 268.
law and equity, jurisdiction of, 266, 267.
law, relation to, 329, 330.
decisions, 585.
law and,
Judicature Acts, 603.
Mansfield and Blackstone's views, reasons for rejection of, 595-601.
questions of reform, 603.
relations between, 583 *sqq.*
relations between: Blackstone's views, 590, 593, 594.
separation of—
Mansfield's and Blackstone's views, results of rejection, 601 *sqq.*
reasons for separation, 599, 600, 601.
legal and equitable estate, essential difference between, 302.
legal and equitable remedies, distinction between, 546.
literature of, 179 *sqq.*
loose doctrines at first laid down and afterwards rejected, 228.

EQUITY (*cont.*)—
Maitland on, 602.
Mansfield's attempt to create fusion of legal and equitable rules, 547, 549, 557, 584, 585, 589, 590.
marital rights, settlements in fraud of, 324, 325.
marriage, conditions in restraint of, 274.
married women, restraint upon anticipation, 266, 325.
married women, separate estate of, 275, 276, 324, 325.
mediæval use and modern trust, distinction between, Lord Mansfield on, 302, 303.
mortgages, 277, 278, 279.
portion, satisfaction by legacy, 269.
possibilities and choses in action, assignment of, 270.
procedure and practice, defects and abuses in, 285-292.
reform of, 292, 293, 294, 295, 296.
province of, 281 *sqq.*
Shelley's Case : Thurlow and Hargrave, 323.
some leading principles, 265 *sqq.*
statutes, construction of, 259.
Thurlow's part in development of, 323.
Trade mark cases, 283, 284.
trusts, charitable, 271.
trusts, executed and executory, 272.
works on,
Bacon's *Maxims of the Law*, 189.
Ballow's *Treatise on Equity*, 191, 192, 222 *sqq.*
Barton's *Historical Treatise of a suit in Equity*, 181.
Bohun's *Cursus Cancellariæ*, 180, 185.
Broom's *Legal Maxims*, 189.
Brown's *Praxis Curiæ Cancellariæ*, 179, 180.
Fonblanque, *Treatise of Equity*, 193, 230, 602.
Francis, *Maxims of Equity*, 188, 190.
Gilbert's *Devises, etc.*, 187.
Gilbert's *History and Practice of the High Court of Chancery*, 182, 183, 186.
Gilbert's *Uses and Trusts*, 187.
Grounds and Rudiments of Law and Equity, 189, 424.
Harrison's *Accomplish'd Practiser in the High Court of Chancery*, 181.
Mitford, *Equity Pleading*, 182, 183, 184, 185.
Practical Register in Chancery, 180.
practice and pleading, books on, 179 *sqq.*
ESCHEAT,
death of *cestui que trust* without heirs, 585, 586, 587.
law of, 301-303.
EVIDENCE,
books on, 365-367.
deed, proof of : calling of subscribing witness, 506.
estoppel by conduct, 504.
Hardwicke, Lord, decisions, 280, 281.
hearsay, 507.
Mansfield's rulings on, 504-510.
nisi prius, rulings at, 504.
presumption—lost grant, 517.
presumptions : Mansfield's rulings, 505, 506.
witnesses, qualifications and disqualifications, 508, 509.
EXCHEQUER,
Chief Barons (1700-1756), list of, 431, 455.
Chief Barons, names of ; *see* Chief Barons of the Court of Exchequer.
Gilbert's History of the, 411.
jurisdiction of Court, 456.
equitable jurisdiction, 458.
practice, books on, 351, 352, 353, 358.
Revenue cases in the, 457.
EXCOMMUNICATION,
Jenkins's advice to substitute writ *de contumace capiendo*, 659.
writ *de excommunicato capiendo*, 680.
EXECUTION,
Gilbert's *Law of Executions*, 355.
EXECUTOR,
common law action against for legacy, 588.
EXTON, JOHN,
Judge of the Court of Admiralty, 1649-1665, 646.
The Sea Jurisdiction of England, 626.
EXTON, THOMAS,
Judge of the Court of Admiralty, 1677, 646.
EYRE, SIR JAMES,
career of, 565, 566.
Chief Baron of the Exchequer, 1787-1793, 565-568.
Chief Justice of the C.P., 1793-1799, 566.
decisions, 566, 567.
EYRE, SIR ROBERT,
Chief Baron, 1723-1725, 448, 455.
Chief Justice of the C.P., 1725-1736, 448, 455.
Judge of the King's Bench, 1710-1723, 448.
Solicitor-General, 1707-1710, 448.

F

FEARNE, CHARLES,
career of, 373, 374.
works by,
Chart of Landed Property, 374.
Essay on Contingent Remainders and Executory Devises, 374, 375, 415, 429.

FERRIÈRE, C. J. de,
History of the Roman or Civil Law (Beaver's translation), 641.
FIELDING, HENRY,
called to the bar *ex gratia*, 23.
FINCH, SIR HENRY,
Nomotechnia, 418, 419.
FINES AND RECOVERIES,
books on, 377, 378.
Fleta,
Clarke's edition of, 246.
FLOYER, PHILIP,
Proctor's Practice in the Ecclesiastical Courts, 618, 619.
FOLEY, ROBERT,
Laws relating to the Poor, etc., 338.
FONBLANQUE, J.,
Treatise of Equity, 193, 230, 602.
FOREIGN JUDGMENTS,
duty to respect, 654.
FORTESCUE, WILLIAM,
Master of the Rolls, 245, 246.
FORTESCUE-ALAND, JOHN,
Baron of the Exchequer, 461.
Judge of the King's Bench and Common Pleas, 461.
Solicitor-General, 460, 461.
FOSTER, MICHAEL,
career of, 135, 136.
Judge of the King's Bench, 1745-1763, 478.
FOX'S INDIA BILL,
opposed by Lord Camden, 307.
FOX'S LIBEL ACT,
supported by Lord Camden, 305, 307, 308.
FRANCIS, RICHARD,
Maxims of Equity, 188, 190.
FRAUDS, STATUTE OF,
Jenkins, Sir L., his part in drafting of Statute, 658.
FRENCH REVOLUTION,
terror of delayed reform of Parliamentary reform in England, 735.
FURNEAUX, DR. PHILIP,
Blackstone's views on the Toleration Act, criticism of, 714.
FURNIVAL'S INN,
attached to Lincoln's Inn, 41, 42 *n.*, 44.

G

GAME LAWS,
Paul's book on the, 394.
GAOL FEVER,
death of judges from, 455, 456.
GARDINER, R.,
Instructor Clericalis, 357.
GIBBON, EDWARD,
Blackstone and, *Appendix*, 750.
English Civilians and Canonists, 605.
Roman Law in England, statement concerning, 701.
GIBBON, EDWARD (*cont.*)—
Vinerian Professorship, establishment of, *Appendix*, 750.
GIBSON, EDMUND (Bishop of London),
career of, 607.
works by,
Codex Juris Ecclesiastici Anglicani, 607-610, 624.
Synodus Anglicana, 607.
GILBERT, SIR JEFFREY, C.B.,
career of, 140, 141.
chief Baron, 1725-1726, 140, 455.
works by,
Common Law Practice, books on, 352.
Devises and Last Wills, 368.
Ejectments, Devises and Rents, treatises on, 169, 170, 187.
History and Practice of the High Court of Chancery, 182, 183, 186.
History of the Exchequer, 411.
Law and Practice of Distress and Replevin, 355, 371.
Law and Practice of Ejectments, 355, 371.
Law of Evidence, 366, 367.
Law of Executions, 355.
Treatise on Rents, 370.
Treatise on Tenures, 369, 370.
Uses and Trusts, 187, 368.
GLASSON, ERNEST,
Blackstone's *Commentaries*, on, 733.
GODOLPHIN, JOHN,
Orphan's Legacy, 619.
GOODHART, PROFESSOR A. L.,
authority of decided cases, 146 *n.*, 157 *n.*, 159 *n.*, 160 *n.*
GORDON RIOTS,
Cowper's lines on, 474 *n.*
Mansfield's House destroyed, 474.
GOVERNMENT DEPARTMENTS,
legal advisers to, 11, 12, 13.
GRAFTON, DUKE OF,
Thurlow's reply to, 318 *n.*
GRAND JURIES,
Lord Somers' book on, 346.
GRANTLEY, LORD,
see Norton, Fletcher.
GRAY'S INN,
calls to the bar *ex gratia*, 22, 23.
chambers, letting and management of, 37.
chapel, 33.
committee's report on finance, 1720, 18.
gardens, 35.
Grand Nights, 40.
Hall, 34.
lectures provided by, 80, 81.
Library, 34.
precedence in Hall, 22.
servants and accounts, 36.
women inhabitants, orders against, 38.

GREAT SEAL,
Commissioners of the, 297, 313.
GREEN, EDWARD,
Spirit of the Bankruptcy Laws, 388.
GROSE, NASH,
Judge of the King's Bench, 1787-1813, 485.
GROTIUS, HUGO,
his books on International law, 631, 632, 634, 636, 643.

H

HABEAS CORPUS BILL, 1758,
Mansfield's speech on, 471.
support of, 251.
HALE, SIR M.,
History of the Common Law, 425.
HAMMOND,
Blackstone's *Commentaries*, American edition of, 712 *n.*, 725.
HARCOURT, SIR SIMON,
Lord Chancellor, 1710-1714, 195.
career of, 201-202.
judgments, 202-203.
HARDWICKE, EARL OF,
career of, 238 *sqq.*
Chancellor, takes seat as, 244.
Chancery, Court of, business during Chancellorship of, *Appendix*, 742.
Chief Justice, 243, 432.
constitution, admiration for, 250, 251.
decisions of, 256, 257 *sqq.*, 432.
decree, refusal to make if contrary to ascertained principle, 261.
delays in Court and defects in procedure, not responsible for, 294, 295.
Earldom conferred on, 245.
Ecclesiastical jurisdiction: *Middleton* v. *Crofts*, 242.
equity acts *in personam*: *Penn* v. *Lord Baltimore*, 264.
equity, conscience in administration of, 262, 264.
contribution to modern system of, 237 *sqq.*, 257 *sqq.*
contribution to substantive principles of, 258 *sqq.*
Habeas Corpus Bill, 1758, 251.
intellectual qualities, 254 *sqq.*
Kames, Lord, correspondence with, 584, 600.
law and equity, jurisdiction of, 266, 267.
law reforms, 249.
lawyer, as a, 252, 253 *n.*
legal education of, 86.
luck of, 247.
Mansfield, Lord, on, 253, 254.
Marriage Act passed, 273.
mediates between Pitt and the Duke of Newcastle, 247, 248.
HARDWICKE, EARL OF (*cont.*)—
notes and reports, 255, 256.
practice and procedure, attempts to arrest deterioration of, 285 *sqq.*
procedure, reform, attitude to, 292, 293, 294, 295, 296.
resignation and death, 245.
Scottish system of law and equity in same Court, views on, 330.
HARGRAVE, FRANCIS,
some account of, 410.
State Trials, an edition edited by, 127, 128.
Thurlow's reliance on, 323.
works by.
Coke upon Littleton, ed. an edition of, 371, 372, 410, 429.
Collectanea Juridica, 410, 411.
Law Tracts, 410.
HARRIS, GEORGE,
Four Books of Justinian's Institutes, 641.
HARRISON, JOSEPH,
Historical Treatise of a Suit in Equity, 181.
HARVARD UNIVERSITY,
Law School established, 1817, 100.
Story, Joseph, appointed Dane Professor at Harvard, 100.
HASTINGS, WARREN,
Thurlow's defence of, 319, 320.
HATSELL, JOHN,
House of Commons Procedure, book on, 346.
HAWKINS, WILLIAM,
Pleas of the Crown, 361, 362.
HAWLES, SIR JOHN,
Solicitor-General, 1695-1702, 459.
HAY, SIR GEORGE,
career, 672, 673.
Dean of the Arches, 673.
decisions, 672, 673, 674.
Judge of the Court of Admiralty, 669, 672.
Judge of the Prerogative Court, 673.
HEDGES, CHARLES,
career of, 662, 669.
Judge of Court of Admiralty, 662, 669.
Judge of the Prerogative Court, 662, 669.
Prize, decisions as to, 669, 670, 671.
HENLEY, ROBERT (Earl of Northington),
career of, 297-299.
decisions, 299-304.
Lord Keeper and Chancellor, 297-304.
HERESY,
Hobhouse's book on, 621, 622.
HEWITT, JAMES,
Judge of the King's Bench, 1766-1768, 485.

HICKES, GEORGE,
Thesaurus, 403.
HICKEY, WILLIAM,
recounts difficulty of obtaining Thurlow's opinion, 316.
recounts Lord Northington's rudeness to Charles Yorke, 311 *n.*
Thurlow's mistress, 320 *n.*
HIGDEN, REV. WILLIAM,
The English Constitution with respect to the Sovereign Authority of the Prince, etc., 345.
HIGH COURT OF DELEGATES,
reform of: Sir L. Jenkins's efforts, 658.
HIGHWAYMEN'S CASE,
suit for account between highwaymen, 59, 67.
HOBHOUSE, SIR BENJAMIN,
Treatise on Heresy, 621, 622.
HOLLAND,
War with, 1672, 649.
HOLLAND, SIR T. E.,
Jurisprudence, 643.
HOLLIDAY, JOHN,
Life of Lord Mansfield, 464 *n.*, 465 *n.*, 466 *n.*, 467 *n.*, 469 *n.*
HORSEMAN, GILBERT,
Notes on the Fundamental Laws of England, 424, 425.
"HORTENSIUS,"
Deinology, 425.
HOUARD, DAVID,
Traités sur les Coutumes Anglo-Normandes, 403.
HOUSE OF COMMONS,
Elections, book on, 346.
Hatsell's book on House of Commons Procedure, 346.
HOUSE OF LORDS,
Peers, creation of in order to carry Treaty of Utrecht, 447.
reports of cases in, 104, 105.
HOWELL, THOMAS JONES,
State trials, an edition edited by, 128, 129, 130.
HÜBNER, M.,
De la Saisie des Bâtiments Neutres, 637.
HUSBAND AND WIFE,
books on, 399.

I

IBBETSON, JAMES,
tracts on Saxon and Norman Institutions, 404.
IMPRESSMENT OF SEAMEN,
Butler's tract on, 347.
Indebitatus Assumpsit,
actions of, 542, 543, 545, 546, 569.
INFANT,
capacity to make a contract, 273-275, 518.
marriage of, 273, 274.
The Infant's Lawyer, 399, 400.
INNER TEMPLE,
arrest for debt, freedom within precincts, 37.
Hall, 34.
Library, 34, 35.
revels in eighteenth century, 16.
INNS OF CHANCERY,
admission of members, 31.
attornies and solicitors, membership of, 43.
Inns to which attached, 40, 41, 42 *n.*, 43 *n.*, 44, 45.
position of: authority of Inns of Court over, 41, 42.
INNS OF COURT,
admission, appeal against refusal to admit, 30, 31.
associate benchers, 20.
benchers in sole control, 18.
benchers, qualifications, 21.
calls to the bar, 22 *sqq.*
appeal against refusal to call, 31, 32.
conditions of call, 23, 24, 26, 27.
chambers, letting and management of, 37.
conveyancers, 26, 27.
disputes with members, jurisdiction of Courts, 29, 30.
educational activities ceased at beginning of eighteenth century, 16.
expulsion of members; right of appeal, 28, 29.
gardens, 35.
government of, 18.
Gray's Inn, Committee on finance's criticisms, 18.
Inns of Chancery, 40, 41, 42.
King's Counsel, right to be called to bench, 20.
lectures and examinations established, 101.
libraries, 34, 637.
Lincoln's Inn, barristers, limited control over calls to the bar, 19.
management of, 33 *sqq.*
Masters in Chancery, resolution against calling to the bench, 20.
Middle Temple, barristers and students, attack on benchers, 19.
barristers and students propose reforms, 18.
organization and discipline, 18.
Readers, 21.
revels and feasts in eighteenth century, 16, 17.
Serjeant's Inns, 14.
Treasurer, qualifications, 21, 22.

INNS OF COURT (*cont.*)—
work of, in eighteenth century, 17.
And see under Names of Inns.
Instructor Clericalis,
see Gardiner, R.
INSURANCE CASES,
procedure in, 495.
INSURANCE, FIRE,
policies, rules attaching to, 540, 541.
INSURANCE LAW,
books on,
Magens' *Essay on Insurances*, 385, 386.
Park's *System of the Law of Marine Insurances*, 390, 391.
INSURANCE, MARINE,
contract of indemnity, 537, 538.
contract of, Mansfield on, 525, 528.
insurance policies, definitions, 532, 533.
Mansfield's decisions, 536 *sqq.*
partial loss, recovery for, 538.
premium, return of, 539, 540.
risks, insurer's knowledge of assumed, 537.
total loss, recovery for, 537.
valued policies, 539.
wagering policies void, 539.
warranty, 536.
INTERNATIONAL LAW,
contraband goods, rights of subjects *inter se*, 655.
Inns of Court libraries, books in, 637.
literature of, 631 *sqq.*
modern, growth of, 635 *sqq.*
And see Admiralty, Court of.
INTESTATE SUCCESSION,
Lovelass's book on, 395, 396.

J

JACOB, GILES,
works by,
Compleat Court Keeper, 381.
General Law of Estates, 371.
Law Dictionary, 176, 177.
Law Grammar, 424.
Laws of Taxation, 347.
Lex Constitutionis, 339, 340.
Lex Mercatoria, 384.
The Modern Justice, 334.
The Students' Companion, 425.
Treatise of Laws, 425.
JAMES II,
privateers, commissions issued, position as to, 664.
JEKYLL, SIR JOSEPH, M.R.,
Master of the Rolls, 1717-1738, 219.
career of, 219-221.
judgments, 221, 222.
JENKINS, SIR LEOLINE,
absolute monarchy, not favoured by, 650, 651.
JENKINS, SIR LEOLINE (*cont.*)—
career and achievements of, 647-652.
Charles II's appreciation of, 660 *n.*
contraband goods, rights of subjects *inter re*, 655.
ecclesiastical law, opinions on, 658.
enemy ship makes enemy goods, 654, 655.
excommunication; advised a substitute writ, 659.
fine character, 659, 660.
foreign judgments, duty to respect, 654.
High Court of Delegates, attempt to reform, 658.
letters of marque and reprisal, on, 653.
maritime law, opinion on points of, 656, 657.
Peace Treaties negotiated by, 649.
Prize Law, decisions on, 654-656.
Statute of Frauds, assistance in drafting of, 658.
views and decisions, 651, 652.
JENKINSON, CHARLES,
A Collection of all the Treaties of Peace, Alliance and Commerce, etc., 638.
Discourse on the Conduct of . . . Great Britain in respect to Neutral Nations, 638.
JOHNSON, JOHN,
Clergyman's Vade Mecum, 623.
Collection of Ecclesiastical Laws, 625.
JOHNSON, DR. SAMUEL,
Barrington, friendship with, 401.
Thurlow's relations with, 320, 321.
JONES, SIR WILLIAM,
Essay on the Law of Bailments, 393, 394, 429.
references to, 239, 314.
JUDGES,
common law, serjeants only eligible in eighteenth century, 5, 6.
And see Admiralty, Chief Barons of the Exchequer, Common Pleas, King's Bench, and Masters of the Rolls.
JUNIUS, LETTERS OF,
Mansfield, direction to jury as to damages, 523 *n.*
Mansfield, letters to, 473, 483 *n.*
Mansfield's use of equitable principles, 558 *n.*
Norton, Fletcher, lines on, 562 *n.*
Smythe, C. B., attack on, 565.
Wedderburn A., opinion of, 571, 574.
Yates, J., statements concerning, 482, 483.
Jura Ecclesiastica,
contents of, 613, 614.
JURISDICTION,
anomalies of, 695, 696, 697, 698, 699.
concurrent, 698, 699, 700.

JURISPRUDENCE,
literature of, 642 *sqq.*
Wooddeson's *Elements of Jurisprudence*, 428, 429.
JURY,
General verdicts, 495, 496.
power to give, Mansfield's judgment in *St. Asaph* case, 513.
JUSTICES OF THE PEACE,
works on,
Astry's book on the criminal business of justices, 334.
Blackerby's *Justice of the Peace his Companion*, 334, 335.
Boyd's book on Justices, 335.
Burn's books on, 332-335. 339.
Jacob's *Modern Justice*, 334.
Nelson's *Office and Authority of a Justice of the Peace*, 334.
JUSTINIAN,
Digest and Code, 173.

K

KAMES, LORD,
Hardwicke, correspondence with, 584.
Scottish system of law and equity in same Court: correspondence with Hardwicke, 330.
some account of, 583 *n.*, 600.
KELHAM, ROBERT,
books of, 403.
Law-French Dictionary, 177.
KENNETT, WHITE,
Ecclesiastical Synods and Parliamentary Convocations of the Church of England, 624, 625.
KENYON, LORD,
career, 576-579.
character, 577 *n.*, 578, 579.
Chief Justice, 1788-1802, 328, 576-583.
decisions, 580-583.
Eldon's opinion of, 328 *n.*
Master of the Rolls, 1784-1788, 328, 578.
KING, THE,
Divine right, question of, 345, 651.
KING, PETER,
Lord Chancellor, 1725-1733, 210-214.
career of, 210, 211.
Chief Justice of the C.P., 1714-1725, 211, 447.
judgments, 211, 212.
reforms instituted by, 213, 214.
KING'S BENCH,
Chief Justices (1700-1756), list of, 431.
Chief Justices,
Hardwicke, Lord, 1733, 243, 432.
Kenyon, Lord, 1788-1802, 328, 576-583.
Lee, Sir William, 1737-1754, 442-446.
KING'S BENCH—Chief Justices (*cont.*)—
Macclesfield, Lord (Thomas Parker), 1710-1718, 204, 432.
Mansfield, Lord, 1756-1786, 472 *sqq.*
Pratt, John, 1718-1725, 432-437.
Raymond, Robert, 1725-1733, 437-442.
Ryder, Dudley, 1754-1756, 446, 447.
Judges of,
Ashhurst, William Henry, 1770-1799, 486-488.
Aston, Richard, 1765-1778, 484, 485.
Blackstone, Sir William, Feb.-June, 1770, 485, 706, 707.
Buller, Sir Francis, 1778-1794, 488-492.
Denison, Thomas, 1741-1765, 478, 479.
Eyre, Robert, 1710-1723, 448.
Foster, Michael, 1745-1763, 135, 136, 478.
Grose, Nash, 1787-1813, 485.
Hewitt, James, 1766-1768, 485.
Willes, Edward, 1768-1787, 486.
Wilmot, John Eardley, 1755-1766, 478, 479, 480.
Yates, Joseph, 1764-1770, 482, 483.
Practice, books on, 351, 352, 357, 358.
Procedure and Pleading, 493 *sqq.*
KING'S COUNSEL,
bench of Inn, right to be called to, 20.
position and duties, 10.
precedence and numbers in eighteenth century, 4, 5.
KINGSTON, DUCHESS OF,
case of, 314.
KYD, STEWART,
career of, 400.
works by,
Comyns' *Digest*, continuation of, 400.
Law of Corporations, 400, 429.
Treatise on the Law of Awards, 393, 429.
Treatise on the Law of Bills of Exchange, 390, 429.

L

LAMB, CHARLES,
born in the Temple, 46 *n.*
LAND LAW,
books on, 367-383.
common recoveries, 516.
copyholds, 380, 381.
ejectment, actions of, 516, 517.
Mansfield's decisions on the, 515.
registration of title to land, 378, 379, 380.
title: lost grant: presumption from long user, 517.

LANDLORD AND TENANT,
books on, 383.
covenant, liability of underlessee, 517.
LAW,
Blackstone's *Commentaries*, place of in the study of English law, 418, 419, 420, 421, 423, 431.
books purchased by law libraries, 430.
case law system, 146-162.
comparative law, study of, 161.
equity and, decisions, 585.
Judicature Acts, 603.
Mansfield's and Blackstone's views, reasons for rejection, 595-601.
questions of reform, 603.
reasons for separation, 599, 600, 601.
relations between, 329, 330, 583 *sqq.*
relations between; Blackstone's views, 590, 593, 594.
separation of, Mansfield's and Blackstone's views, results of rejection, 601 *sqq.*
equity or trust, courts of law take notice of, 589.
legal theory, books on, 427.
Mansfield's attempt to create fusion of legal and equitable rules, 547, 549, 557, 584, 585, 589, 590.
obsolete rules, Mansfield's departure from, 553.
reform: Bentham's and Austin's part in, 736.
Roman civil law, reception of, 161.
students' books on English law, 89, 417 *sqq.*
study of, an advantage to those who do not intend to be lawyers, 419 *n.*
And see Common Law.
LAW DICTIONARIES AND INDEXES,
Blount's Law Dictionary, 175, 176.
British Academy's Latin word-list, 177.
Cowell, 175, 176.
General Index to the Common Law, 178.
Jacob, 176, 177.
Kelham's Law-French Dictionary, 177.
Nelson, 175, 176.
Repertorium Juridicum, 178.
Spelman, 175.
Termes de la Ley, 175, 177.
LAW, J. T.,
Forms of Ecclesiastical Law (translation of the first part of *Ordo Judiciorum*), 617.
LAW OF PROPERTY ACTS,
effect of, 604.
LAW REPORTS,
see Reports.
LAW SOCIETY,
began as the Society of Gentlemen Practisers, 44, 62, 64.
Clifford's Inn, sale of: half the proceeds received by the, 45.
Day's scheme for a Governing Corporation opposed by, 65.
lectures first established by, 100.
Incorporation of, 66.
Scriveners' Company, claims opposed by, 71.
Laws Ordinances and Institutions of the Admiralty of Great Britain, etc., contents of, 627, 628, 629.
LECHMERE, NICHOLAS,
Attorney-General, 1718-1720, 460.
Solicitor-General, 1714-1715, 460.
LEE, SIR GEORGE,
Chancellor of the Exchequer, failure of suggested appointment as, 663, 666.
Dean of the Arches, 1751, 666.
decisions, 106, 107, 665, 666, 667, 668, 669.
Judge of the Prerogative Court, 1751, 666.
LEE, SIR WILLIAM,
Chief Justice, 1737-1754, 442.
decisions of, 443-446.
LEGAL EDUCATION,
America, in, 100.
benefit to from sale of Inns of Chancery, 44, 45.
Blackstone on teaching the law, 96-99.
Blackstone's attempt to establish system of, 91.
books, 89, 417 *sqq.*
Bowen, Lord, early experiences, 101 *n.*
defective in eighteenth century, 17.
Dicey on teaching the law, 101.
Eldon, Lord, advice to a law student, 87, 88.
exercises, decay of, 78, 79.
exercises, how performed, 80.
Harvard Law School established, 100.
Inns of Court, lectures and examinations established by, 101.
Law Society, first lectures established by, 100.
Lectures at Lincoln's Inn and Gray's Inn, 80, 81.
old system, breakdown of, 42.
reading in solicitor's office, 86.
University examinations farcical, 83, 84, 85.
And see Inns of Court.
LEGAL HISTORY,
books on, 402 *sqq.*
LEGAL PROFESSION,
Admiralty, King's and Lord High Admiral's Advocates, 11.

LEGAL PROFESSION (*cont.*)—
Advocate-General, 4, 6, 7, 9.
Advocates in ecclesiastical and Admiralty Courts, 4, 5, 7, 50, 51.
Attorney-General, 4, 6, 7.
Attornies, 8, 9, 51 *sqq.*
Barristers; *see* Inns of Court, and under separate Inns.
Board of Trade, Standing Counsel to, 10, 11.
Conveyancers, 26, 27.
Conveyancing, Scriveners' Company's attempt to control in City of London, 70-72.
Doctors' Commons, 46.
Doctors of Law, 7, 83, 84.
Duchy of Cornwall, Attorney-General for, 10.
Duchy of Lancaster, Attorney-General for, 10.
Ecclesiastical and Admiralty Courts, King's proctor, duties of, 12.
education of; *see* Legal Education.
Government departments, legal advisers to, 11, 12, 13.
Inns of Court, 15 *sqq.*
Judges, Common law, serjeants only eligible in eighteenth century, 5, 6.
King's Counsel, 4, 5, 10, 20.
numbers in 1779, 4.
order of precedence in eighteenth century, 4.
organization and discipline, 14, 17.
proctors, 8, 9, 75-79.
Queen's Attorney, 10.
Recorder of London, 5, 12.
Serjeants' Inns, 14.
Solicitor-General, 4, 6, 7.
Solicitors, 8, 9, 51 *sqq.*
Treasury, junior counsel to, 11.
Treasury, solicitor to the, 11, 12, 13.
And see Attorneys; Inns of Court; Law Society; and Solicitors.

LEGGE, THOMAS,
Law and Practice of Outlawry in Civil Actions, 355.

LETTERS OF MARQUE,
Jenkins, Sir L., on, 653.

LÉVY-ULLMANN, PROFESSOR,
Blackstone's *Commentaries*, praise of, 726.

LIBEL,
books on, 396, 397.
Dean of St. Asaph's Case, 513.
general verdict in cases of, 513.
jury, general verdict: Camden's support of principle, 305.
Shebbeare case, 305.

LILLY, JOHN,
Collection of Modern Entries, 358.
Practical Conveyancer, 376.

LINCOLN'S INN,
barristers, limited control over calls to the bar, 19.
bencher's qualifications, 21.
calls to the bar; ceremony of call, 25.
catering arrangements, reform of, 38, 39.
chambers, letting and management of, 37.
Chapel, 33.
conduct of members, unseemly, punishment of, 28.
Dean of the Chapel, 21.
exercises, how performed, 80.
Grand Nights, 39, 40.
International law, early books on, in library, 637 *n.*
Keeper of the Black Book, 21.
lecturer at, 81.
Library, 34.
Master of the Library, 21.
Master of the Walks, 21.
New Square and Stone Buildings, 35.
Old Hall, 33, 34.
Reader, position of, 21.
revels in 1706, 16.
servants, 36.
Treasurer, position of, 21.
Treasurer's and Readers' feasts, 17.
women inhabitants, orders against, 38.

LLOYD, NATHANIEL,
King's Advocate, 1715-1727, 646.

LLOYD, RICHARD,
Dean of the Arches and Judge of the Court of Admiralty, 646.

LOCAL GOVERNMENT,
literature of,
Astry's *General Charge to all Grand Juries*, 334.
Blackerby's *Justice of the Peace his companion*, 334, 335.
Boyd's *Office Powers and Jurisdiction of Justices of the Peace*, 335.
Burn's *History of the Poor Law*, 338, 339.
Burn's *Justices of the Peace*, 332-334, 335, 339.
Carter's *Legal Provisions for the Poor*, 338.
Dalton's *Compleat Sheriff*, 335, 336.
Farley's *Laws relating to the Poor*, 338.
Jacob's *Modern Justice*, 334.
Nelson's *Office and Authority of a Justice of Peace*, 334.
Ritson's *Office of Constable*, 336, 337.
Shaw's *Parish Law*, 338.
Umfreville's *Lex Coronatoria*, 336.
Welch, Saunders, *Observations on the Office of Constable*, 336.

LOFFT, CAPEL,
Essay on the Law of Libels, 396, 397.

LONDON, CITY OF,
Recorder and Solicitor, 5, 12.
LORD CHANCELLORS,
list of, 1700-1737, 194.
list of, 1756-1792, 297.
Bathurst, Henry (Lord Apsley), 1771-1778, 313.
Camden, Earl, 1766-1770, 306.
Cowper, Earl (Lord Keeper and L.C.), 1705-1710, 1714-1718, 195-198.
Harcourt, Sir Simon, 1710-1714, 195.
Hardwicke, Earl of, 1737-1756, 244.
King, Peter (Lord King), 1725-1733, 210-214.
Loughboroguh, Lord, 1793-1801, 573.
Macclesfield, Lord, 1718-1725, 204 *sqq*.
Northington, Earl of, 1757-1766, 297-304.
Talbot, Lord, 1733-1737, 214-218.
Thurlow, Lord, 1778-1782, 1783-1792, 318, 319.
Wright (Lord Keeper), 1700-1705, 194.
Yorke, Charles, accepts Chancellorship and dies three days after, 312.
LOUGHBOROUGH, LORD,
advancement, talents subordinated to, 572, 574.
Attorney-general, 1777, 572.
Butler's opinion of, 574, 575.
career of, 569-574.
Chief Justice of the C.P., 1780-1793, 569-576.
death of, 1805, 573.
decisions, 575, 576.
Junius on, 571, 574.
Lord Chancellor, 1793, 573.
statesmanship, lack of, 572, 574.
LOVAT, LORD,
impeachment of, 469.
LOVELASS, PETER,
Intestate Succession, 395, 396.
LUNACY,
Brydall's book on, 398, 399.
LYON'S INN,
attached to the Inner Temple, 41, 42 *n*.

M

MACCLESFIELD, EARL OF,
account of, 204-207.
character, 206, 207.
Chief Justice, 1710-1718, 204, 432.
judgments, 207-210, 432.
Lord Chancellor, 1718-1725, 204 *sqq*.
MACDONELL, SIR JOHN,
State Trials, editor of, 128.
MADOX, THOMAS,
some account of, 404-409.
works by,
Baronia Anglica, 405.
Firma Burgi, 405, 406 *n*.
Formulare Anglicanum, 404, 405, 406, 407, 408.
History of the Exchequer, 404, 405, 406, 407.
MAGENS, NICOLAS,
An Essay on Insurances, 385, 386.
MAITLAND, FREDERIC WILLIAM,
Blackstone, comparison with, 720.
Bracton and Coke, comparison between, 416.
equity and the law, 602.
History of English Law, 725.
lawyer, training in modern law necessary for work on legal history, 417 *n*.
MALLORY, JOHN,
Quare impedit, book on, 355.
MANBY, W.,
Law and Practice of Fines and Recoveries, 378.
MANSFIELD, EARL OF,
Act of God, loss from, 519 *n*.
Attorney-General, 468.
bankruptcy, decisions on law of, 541.
Blackstone's *Commentaries* as a student's book, 418.
Blackstone's *Commentaries*, influence on, 723.
Blackstone's *Commentaries*, praise of, 476.
Butler, Charles, on decisions of, 554.
Butler's *Reminiscences*, 464 *n*., 467 *n*., 468, 475.
career and character, 464 *sqq*.
Chief Justice, 1756, 463, 472.
commercial and maritime law, decisions on, 524 *sqq*.
common law, influence on future development of the, 549 *sqq*.
common law, profound influence on, the, 477.
consideration, attempt to recast doctrine of, 517, 518.
constitutional law, decisions on, 510-512.
contemporaries and successors, 560 *sqq*.
contract, concurrent conditions in, 520.
contract, decisions in law of, 517-521.
copyright, decisions on, 559.
criminal conversation: question of damages, 523.
Dean of St. Asaph's Case, judgment in, 513.
decisions of, 467 *n*., 475 *n*., 476, 477 *n*., 478.

MANSFIELD, EARL OF (*cont.*)—
decisions reversed, 559.
defamation, decisions on law of, 522.
Earldom conferred on, 475.
equitable principles followed in common law cases, 558.
estoppel by conduct, equitable doctrine of, 504.
evidence, rulings on, 504-510.
fusion of rules of law and equity, attempt to create, 547, 549, 557, 584, 589, 590.
Gordon Riots, Mansfield's house destroyed, 474.
greatest common lawyer of the century, 330, 331, 463.
Habeas Corpus Bill in Lords, speech on, 471.
Hardwicke, Lord, tribute to, 253, 254.
Holliday's life of, 464 *n.*, 465 *n.*, 466 *n.*, 467 *n.*, 469 *n.*
indebitatus assumpsit, decisions in actions of, 542, 543, 545, 546, 569.
Jacobite, accused of being a, 471.
Junius's letters to, 472, 473, 483 *n.*, 558 *n.*
knowledge of other systems of law, 555.
law and equity, reasons for rejection of views, 595-601.
law and equity, separation of—results of rejection of views on, 601 *sqq.*
law reform, attitude to, 550, 551.
libel, general verdict in cases of, 513.
Lovat, Lord, impeachment of, 469.
marine insurance, contribution to law of, 390.
decisions on, 536-540.
marriage, 466.
Mastership of the Rolls, refusal of, 472.
mediæval use and modern trust, distinction between, analysis of, 302, 303, 586.
negotiable instruments, title of *bona-fide* holder, 529, 530.
new trials, necessity of granting, 497.
obsolete rules of law, departure from, 553.
orator: position in House of Commons, 470, 471.
pleading, reform of archaic rules of, 500, 501.
pleadings, amendment of, 502.
pleadings, prolixity in, 502, 503.
Pope, friendship with, 466.
presumptions, rulings on, 505, 506.
principle preferred to precedent, 152, 153.
MANSFIELD, EARL OF (*cont.*)—
procedure and pleading, reform of, 493 *sqq.*
procedure, dishonest use of technicalities discouraged, 498.
quasi-contract, decisions on, 542 *sqq.*
retirement and death, 476, 477.
Scotland, jury system in civil cases, memorandum on, 551.
Scots law, knowledge of, 556, 557.
law and equity, administration in same Court, approval of, 330, 465.
Silesian loan; remonstrance to King of Prussia, 469.
Solicitor-General, 468.
tort, decisions on law of, 521-524.
Wilkes, reversal of outlawry, judgment on, 552.
MARINE INSURANCE,
see Insurance, Marine.
MARITIME LAW,
see Commercial and Maritime Law.
MARRIAGE,
conditions in restraint of, 274.
matrimonial causes, 685, 686.
MARRIED WOMEN,
marital rights, settlements in fraud of, 324, 325.
restraint upon anticipation: invented by Thurlow, 266, 325.
separate estate of, 275, 276, 324, 325.
MARRIOTT, SIR JAMES,
career and character, 674, 675.
decisions, 675, 676.
Judge of the Court of Admiralty, 674.
The Case of the Dutch Ships Considered, 638.
MARSDEN, R. G.,
Law and Custom of the Sea, 665.
MARTIAL LAW,
books on, 629, 630.
MASERES, FRANCIS,
career of, 398.
Doctrine of Life Annuities, 398.
MASTER AND SERVANT,
books on, 397.
MASTERS IN CHANCERY,
call to bench of Inn, resolution against, 20.
MASTERS OF THE ROLLS,
list of, 1693-1738, 194.
list of, 1756-1792, 297.
Arden, Sir Richard Pepper, 1788-1801, 320, 327, 328, 329,
Clarke, Thomas, 1754-1764, 245, 246.
Fortescue, William, 1741-1749, 245, 246.
Jekyll, Sir Joseph, 1717-1738, 219-222.
Kenyon, Lord, 1784-1788, 328.

MASTER OF THE ROLLS (*cont.*)—
Sewell, Sir Thomas, 1764-1784, 314, 327.
Strange, John, 1750-1754, 130, 245.
Trevor, John, 1693-1717, 218, 219.
Verney, John, 1738-1741, 245.
MATRIMONIAL CAUSES ACT, 1857,
provisions of, 686, 689.
MAXIMS,
books of, 188, 189, 418, 424, 425.
MERCHANT SHIPPING,
books on, 391.
MIDDLE TEMPLE,
barristers and students, attack on benchers, 19.
barristers and students propose reforms, 18.
chambers, letting of, 37.
Hall, 34.
Henry Fielding called *ex patia*, 23.
Treasurer, qualifications, 21, 22.
MIDDLESEX REGISTRY ACT,
defects in, 379, 380.
MITFORD, JOHN (Lord Redesdale),
Blackstone's *Commentaries*, whether a book of authority, 717.
Equity Pleading, 182, 183, 184, 185.
MOCKET, R.,
Tractatus de Politia Ecclesiae Anglicanae, 624.
Modern Conveyancer,
an early book of precedents, 375.
Modern Entries in English,
collection of Pleadings, 358.
MOLLOY, CHARLES,
De Jure Maritimo et Navali, 627, 629.
MONTAGUE, JAMES,
Chief Baron, 1722-1723, 455.
MONTESQUIEU, CHARLES DE S., BARON DE,
separation of powers, Blackstone's attitude to theory, 734, 735.
MORTGAGES,
books on, 381, 382.
Hardwicke, Lord, decisions as to, 277, 278, 279.
MOSER, J. J.,
his book on International law, 634, 635.
MURRAY, WILLIAM,
see Mansfield, Lord.
MUTINY ACT, 1718,
standing army established by, 196, 197.

N

NAVIGATION ACTS,
history of the, 391.
NAVY,
Impressment, Butler's tract on, 347.
NEGOTIABLE INSTRUMENTS,
see Bills of exchange.
NELSON, W.,
works by,
Law of Evidence, 365, 366.
Lex Maneriorum, 381.
Office and Authority of a Justice of the Peace, 334.
Rights of the Clergy of Great Britain, 623.
NEWFOUNDLAND,
Reeves' History of the Government of, 350.
NEWGATE,
insanitary conditions in, 456 *n*.
NEW INN,
attached to the Middle Temple, 41, 42 *n*.
NEWNAM, W.,
The Complete Conveyancer, 377.
NEWTON, SIR HENRY,
career of, 662, 663.
Judge of the Court of Admiralty, 1714, 663.
NISI PRIUS,
Bathurst and Buller's books on Practice at, 354.
evidence, rulings on, 504.
reports of decisions at, 154 *n*., 155.
NORTH, ROGER,
Discourse on the Study of the Laws, 85.
NORTHEY, SIR EDWARD,
Attorney-General, 1701-1707, 1710-1714, 460.
NORTHINGTON, EARL OF,
see Henley, Robert.
NORTON, FLETCHER (Lord Grantley),
Attorney-General, 1763, 327, 560.
career of, 560-562.
Speaker of House of Commons, 561.
unscrupulous and inaccurate, 561, 562.
NOTTINGHAM, LORD,
Chancellor's conscience, on, 228.

O

OLDYS, WILLIAM,
Privateers, commissions issued by James II, opinion as to, 664.
OUGHTON, THOMAS,
Ordo Judiciorum, 616, 618.
OUTLAWRY,
Legge's book on, 355.
OXFORD UNIVERSITY,
All Souls College, Blackstone's work as bursar, 718, 719.
Blackstone elected first Vinerian Professor of Law, 95.
examinations, farcical nature of, 83, 84, 85.
University Press, Blackstone's efforts for improvement of, 719.
Vinerian law scholars, 92, 93, 94.

OXFORD UNIVERSITY (*cont.*)—
Vinerian Professorship of Law, founded, 92, 93, 94, 95.
Blackstone's inaugural lecture, 96.
course of lectures, 94.

P

PARISH,
Shaw's *Parish Law*, 338.
PARK, JAMES ALAN (Mr. Justice),
System of the Law of Marine Insurances, 390, 391.
PARKER, THOMAS,
see Macclesfield, Earl of.
PARKER, SIR THOMAS,
career of, 133.
Chief Baron, 1742-1772, 455, 456.
PARLIAMENT,
Petition, right to—Lord Somers' book, 346.
representation, reform delayed by French Revolution, 735.
And see House of Commons.
PARTNERSHIP,
cases on, 531.
PATENT LAW,
development of, 532.
PAUL, JOHN,
Digest of the Law Relating to Game, 394, 395.
Every Landlord or Tenant his own Lawyer, 383.
PEERS,
creation of, in order to carry Treaty of Utrecht, 447.
And see House of Lords.
PENALTY,
liquidated damages and, 519, 520.
PENGELLY, THOMAS,
Chief Baron, 1726-1730, 455.
PENRICE, SIR HENRY,
Judge of the Court of Admiralty, 1715-1751, 646, 669, 671.
Prize, decisions as to, 671.
PEPYS, SAMUEL,
Trumbull, Sir W., relations with and subsequent denunciation of, 661.
PHILLIMORE, JOSEPH,
reports of Lee's ecclesiastical decisions, 666, 667.
PHILIPPS, J. T.,
Fundamental Laws and Constitutions of Seven Potent Kingdoms, etc., 542.
PIGOTT, NATHANIEL,
Treatise of Common Recoveries, 378.
PIRACY,
definition of, 670.
Pleader's Assistant, Select Collection of Precedents of Modern Pleadings, etc., 357.
PLEADING,
see Practice, Procedure and Pleading.
PLOWDEN, FRANCIS,
book on registration of conveyances, 380.
Jura Anglorum, 347.
Treatise upon the Law of Usury and Annuities, 397, 398.
POLLOCK, SIR FREDERICK,
authority of decided cases, 146, 147, 154, 156, 157.
Blackstone's *Commentaries*, suggestion for Clarendon Press edition of, 736 *n.*
Consideration, doctrine of, 604.
Holland's *Jurisprudence*, on, 643.
Wait, re, note on, 605 *n.*
POLLOCK AND MAITLAND,
History of English Law, 725.
POOR LAW,
works on,
Burn's *History of the Poor Law*, 338, 339.
Carter's *Legal Provisions for the Poor*, 338.
Foley's *Law Relating to the Poor*, 338.
POPE, ALEXANDER,
Mansfield, friendship with, 466.
verses on, 466 *n.*
POSSESSION,
symbolic delivery of, 280 *n.*
POWELL, J. J.,
works by,
Creation and Execution of Powers, 382.
Essay on the Law of Contracts and Agreements, 392, 429.
Treatise upon the Law of Mortgages, 382, 429.
POWERS OF APPOINTMENT,
books on, 382.
POWNALL, THOMAS,
Administration of the Colonies, 349.
PRACTICE, PROCEDURE AND PLEADING,
Chief Justice, sixteenth century, reference by to defects in records, 351.
defects and abuses in, 285-292.
delays in litigation, 289, 290, 291.
enlarged rules to show cause, 494, 495.
general verdicts, 495, 496.
Hardwicke, Lord, attempts to arrest deterioration of, 285 *sqq.*
in general, 350 *sqq.*
insurance cases, 495.
King's Bench Rules, 493-503.
new trials, 497.
nonsuits, 522.
Pleading,
books on, 356, etc.
common counts, 501.
reform of archaic rules of, 500, 501.

PRACTICE, PROCEDURE, ETC. (*cont.*)—
Pleadings,
amendment of, 502.
prolixity in, 50, 503.
reform of, Lord Hardwicke's attitude to, 292, 293, 294, 295, 296.
special cases, 496.
technicalities, dishonest use of discouraged, 498.
view, motions for, delay caused by, 495.
works on,
Boote's *Historical Treatise of an Action at Law*, 411.
Common Law Courts, books on, 351, 352, 353.
Cooke's *Rules, Orders, etc., in the Common Pleas*, 350, 351.
equity practice and pleading, 179-185.
Exchequer, books on rules and orders, 351.
Law of Errors and Writs of Error, 354, 355.
PRATT, CHARLES,
see Camden, Earl.
PRATT, JOHN,
Chief Justice, 1718-1725, 432-437.
decisions of, 434-437.
PREROGATIVE,
see Royal Prerogative.
PREROGATIVE COURT,
Andrews v. *Powys*, case of, 695
Judges of the Court,
Bettesworth, Dr., 1714, 665.
Hay, Sir George, 1764, 673.
Hedges, Charles, 1711, 662, 669.
Lee, Sir George, 1751, 106, 666.
jurisdiction, conflict of with other Courts, 695, 696, 697.
powers transferred to Court of Probate, 684, 689.
PRESUMPTION,
see Evidence.
PRIESTLY, JOSEPH,
Blackstone's *Commentaries*, attack on, 713.
PRINCIPAL AND AGENT,
cases on, 532.
PRIVATEERS,
Commissions issued by James II, position as to, 664.
Oldys' opinion, 664.
Jenkins, Sir L., on status of, 655.
PRIZE ACTS,
seventeenth and eighteenth century, statutes, 683.
PRIZE CASES,
Reports of, 105.
PRIZE COURT,
decisions, 669, 670, 673, 674, 675, 676, 693, 694.
Jenkins', Sir L., decisions, 654-656.
PRIZE JURISDICTION,
contraband goods, rights of subjects *inter se*, 655.
development of, 676 *n.*
enemy ship makes enemy goods, 654, 655.
And see Admiralty, Court of.
PROBATE,
grants of, 687, 688.
PROBATE, COURT OF,
creation of, 689.
transfer of powers of Prerogative Court, 684, 689.
PROBYN, EDMUND,
Chief Baron, 1740-1742, 456.
PROCEDURE,
see Practice, Procedure and Pleading.
PROCTORS,
origin and duties, 8, 9.
regulation and qualifications, 75-77.
PROHIBITION,
writ of, 697, 700.
PUBLIC LAW,
literature of, 332 *sqq.*
PUBLIC MISCHIEF,
cases involving, 513, 514.
PUFENDORF, SAMUEL,
works by,
De Jure Naturae et Gentium, 636, 643.
translation of, 637.
Les Fondateurs du droit International, 631, 632, 636, 643.

Q

QUARE IMPEDIT,
Mallory's book on, 355.
QUASI-CONTRACT,
implied promise, 544, 545.
Indebitatus assumpsit, action of, 542, 543, 545, 546, 569.
mistake of fact: repayment of money paid under, 544, 546.
QUEEN'S ATTORNEY,
position of, 10.

R

RAM, JAMES,
authority of decisions, 146, 155.
RAYMOND, ROBERT,
Chief Justice, 1725-1733, 437.
decisions of, 438-442.
reports, 437, 438.
RAYNER, JOHN,
Cases at Large concerning Tithes, 620.
Reading on Statutes, 402.
RECORDER OF LONDON,
position of, 5, 12.

RECOVERIES,
books on, 377, 378.
REDESDALE, LORD,
see Mitford, John.
REEVE, THOMAS,
Chief Justice of the C.P., 448.
decisions of, 448.
REEVES, JOHN,
career of, 412.
works by,
History of English Law, 412-415.
History of the Government of Newfoundland, 350.
History of the Law of Shipping and Navigation, 391.
REGISTRATION OF CONVEYANCES,
registration of title distinguished from, 378 *n.*, 379, 380.
REGISTRATION OF TITLE,
registration of conveyances, distinguished from, 378 *n.*, 379, 380.
Yorkshire and Middlesex, registries established, 379, 380.
REPORTERS,
Acton, P.C., 106.
Admiralty reports, 105, 144, 145.
Ambler, 143, 145 *n.*
Andrew, 139.
Anstruther, Exch., 114, 115, 117, 135, 138.
Atkyns, 143, 145 *n.*
Barnardiston, 138.
Blackstone, Henry, 117, 140.
Blackstone, William, 133, 134.
Bosanquet and Puller, 135.
Bott, settlement cases, 108.
Brown, H.L. reports, 104, 105, 145 *n.*
Bunbury, 137, 138.
Burrow, K.B., 111, 112, 116, 139, 140.
Burrow, Settlement cases, 108.
Caldecott, Sessions cases, 108.
Carey, 145 *n.*
Chancery, early cases, 103.
Chancery reports, Table of, 124-126.
Coke's reports, 157.
Colles, H.L. reports, 104.
Comyns, 130.
Cowper, 113, 114.
Cox, 142, 144, 145 *n.*
Dickens, 142.
Douglas, 113, 114, 154 *n.*
Douglas's Election cases, 346.
Dow, H.L. reports, 104, 117.
Durnford and East, 116, 117, 129, 132, 139.
East, 135.
Eden, 145 *n.*, 299.
Election cases, 109.
Equity cas. abr., 144.
Espinasse, N.P., 110.
Fitz-Gibbon, 138, 139.
Forrester, 142, 143.
REPORTERS (*cont.*)—
Foster, Crown cases, 109, 127, 135-137.
Freeman, 145 *n.*
Gilbert, 140, 141.
Haggard, Adm., 145.
Haggard, Consistory reports, 106, 145.
Hay and Marriott, Admiralty, 105 *n.*, 106.
Henley, 144.
Hobart, 148.
Jenkins, 148.
Kelyng, 139.
Kenyon, 134, 145 *n.*
Knapp, P.C., 106.
Leach's Crown Cases, 109.
Lee, eccl. rep., 665, 666, 667.
Lofft, 139.
Marsden, Admiralty and Prize Cases, 107.
Modern reports, 142.
Mosely, 142.
Nolan, settlement cases, 108.
Parker, 133, 455.
Peake, N.P., 109.
Peere Williams, 141, 142, 144, 145 *n.*, 171.
Phillimore, Arches Court, 106, 145.
Practice cases, 109.
Revenue cases, 348.
Ridgeway, 141, 145 *n.*
Robinson, Christopher, 105, 145.
Roscoe's Prize cases, 105.
Sessions cases, 108.
Shower, H.L. reports, 104.
Smith's Leading Cases, 136, 155 *n.*
State trials, 127-130.
Strange, 130.
Swanston, 145 *n.*
Talbot, cases temp., 142, 145 *n.*
Term Reports, 116, 117, 129, 132, 139.
Tothill, 145 *n.*
Vesey, junior, 117, 143.
Vesey, senior, 143, 145.
West, 145 *n.*
Willes, 108, 132, 133.
Wilmot, 134, 135.
Wilson, 133, 138.
Year books, 147, 157, 159.
REPORTS,
authority of decided cases, 146 *sqq.*
Chancery reports, Table of, 124-126.
Coke on the authority of decisions, 151.
Common Law and House of Lords reports, Table of, 118-123.
Eldon, his influence on reporting, 145.
House of Lords objects to reports by Shower, 104.

REPORTS (*cont.*)—
Judges' sanction for publication, 112, 113.
nisi prius decisions, 154 *n.*, 155.
style and rules of reporting, 110.
REVENUE CASES,
in the Exchequer, 348, 457.
REYNOLDS, JAMES,
Chief Baron, 1730-1738, 456.
RICE, JOHN,
see Tremaine, Sir John.
RICHARDSON, R.,
Attorney's Practice in the King's Bench and in the Common Pleas, 360, 396.
Law of Testaments and Last Wills, 396.
RIOT ACT,
passed, 196.
RITSON, JOSEPH,
Courts Leet, books on, 337.
Office of the Bailiff of a Liberty, 337.
ROBINSON, CHRISTOPHER,
Judge of the Court of Admiralty, 1828, 105, 145.
ROLLE'S ABRIDGMENT,
model for later abridgments, 162, 163, 167, 168.
ROMAN LAW,
Civil law, reception of in England, 161.
Gibbon's statement concerning, 701.
literature of, 640 *sqq.*
students' books on, 425.
ROMILLY, SIR SAMUEL,
articled to a sworn clerk in Chancery, 57, 58.
legal education, 86.
ROSCOE, E. S.,
Reports of Prize cases, 105.
ROYAL PREROGATIVE,
Blackstone's and Finch's definition of, 456.
RUTHERFORD, T.,
Institutes of Natural Law, 638, 643.
RYDER, DUDLEY,
Chief Justice, 1754-1756, 446-447.
RYMER, THOMAS,
Fœdera, 409.
Rolls of Parliament, 409.

S

SAINT-GERMAN, C.,
Doctor and Student, 188, 223, 418, 422.
SALKELD, CHARLES,
Hardwicke, Lord, lived and worked with, 239.
SALUSBURY, SIR THOMAS,
decision, 671, 672.
Judge of the Court of Admiralty, 1757-1773, 646, 669, 671.
SAVOY COURT LEET,
Ritson's book on, 337, 338.
SAYER, J.,
Law of Costs, 356.
Law of Damages, 394.
SCOTLAND,
jury system in civil cases, suggested introduction of, 551.
Mansfield's knowledge of Scots Law, 556, 557.
SCOTT, SIR WILLIAM,
see Stowell, Lord.
SCOTTISH LAW,
Boyd's book on Justices of the Peace, 335.
law and equity, administration in same court, 330.
SCRIVENERS' COMPANY,
attempt to control conveyancing business in City of London, 70-72.
SEDGWICK, JAMES,
criticism of Blackstone, 727 *n.*
SEDUCTION,
actions for, 523.
SELDEN, JOHN,
History of Tithes, 620.
SEPTENNIAL ACT,
passed, 196.
SERJEANTS AT LAW,
precedence and numbers in eighteenth century, 4, 5.
SEWELL, SIR THOMAS,
Master of the Rolls, 1764-1784, 314, 327.
SHAW, JOSEPH,
Parish Law, 338.
SHEBBEARE CASE,
Camden's appearance in, 305.
SHERIFFS,
Dalton's *Compleat Sheriff*, 335, 336.
SHIPS AND SHIPPING,
bills of lading, 533.
captain's lien for wages and repairs, 534.
capture of ship :
ransom contract, 534, 535, 693.
insurance of ; *see* Insurance, Marine.
seamen's wages, decisions on, 672, 692.
stoppage *in transitu*, 548.
wreck, supposed rule as to forfeiture, 534.
SILESIAN LOAN,
Mansfield's remonstrance to King of Prussia, 469.
SIMEON, J.,
Law of Elections, 346.
SIMONY,
Cunningham's book on, 398.
SIX CLERKS,
of Court of Chancery, 56, 57.
admission as solicitors, 57.
refusal to sign pleadings : petition against, 68, 69.

SKYNNER, JOHN,
career of, 565.
Chief Baron of the Exchequer, 1777-1787, 565.
SMITH, ADAM,
Wealth of Nations, 349.
SMYTHE, SIDNEY STAFFORD,
career of, 564, 565.
Chief Baron of the Exchequer, 1772-1777, 564.
Junius, attacked by, 562.
SOCIETY OF GENTLEMEN PRACTISERS,
bar, supervision of relation between members and the, 73.
formation of, 63.
meetings, 63, 64.
now the Law Society, 44.
number of members, 64.
reforms, promotion of, 72.
work of the Society, 52, 57, 59, 60, 62, 63, 64, 66, 67, 68, 69, 74, 75, 82.
SOLICITOR-GENERAL,
precedence of, 4, 6, 7.
SOLICITORS,
admission of: Hickeys' experience, 61, 62.
qualifications for, 54, 55.
attornies were usually, 51.
bills of costs, taxation of, 56, 60.
clerical staff of Courts, connection with, 56-58, 68.
costs: increase of fees, 69.
Day's scheme for a governing Corporation, 64, 65, 82.
lien for costs, 60, 61.
origin and position, 8, 9.
practice books, 359.
regulation and discipline, 53, 54.
Six Clerks, of Court of Chancery, admission as Solicitors, 57.
striking off the rolls, 59, 67.
unqualified persons, 55, 67.
" vagabond attornies," 53.
And see Law Society.
SOLICITORS-GENERAL,
Dunning, John, 1768-1770, 562.
Eyre, Robert, 1707-1710, 448.
Fortescue-Aland, John, 1715-1717, 460, 461.
Hawles, Sir John, 1695-1702, 459.
Lechmere, Nicholas, 1714-1715, 460.
Murray, William, 1742-1754, 468.
Thomson, William, 1717-1720, 460.
Thurlow, E., 1770-1771, 317.
Wallace, James, 1778-1780, 564.
Wearg, Sir Clement, 1724-1727, 460.
SOMERS, LORD,
books on Grand Juries and right to Petition Parliament, 346.
SPECIFIC PERFORMANCE,
of contracts, 277, 290.
SPELMAN, SIR HENRY,
Codex Legum Veterum, 403.
STAPLE INN,
attached to Gray's Inn, 41, 42 *n.*, 43 *n.*, 44, 45.
STATE TRIALS,
reports of, 127-130.
STATUTE LAW,
Attornies and Solicitors Acts, 54.
books on, 400, 401, 402.
Matrimonial Causes Act, 1857, 686, 689.
Prize Acts, 683.
STEPHEN, SIR FITZ-JAMES,
History of the Criminal Law,
praise of Blackstone's *Commentaries* in, 716, 725, 726.
STEPHEN'S *Commentaries*,
Dicey's views on, 715.
STOKES, ANTHONY,
Constitution of the British Colonies in North America and the West Indies, 349, 350.
STORY, JOSEPH,
appointed Dane Professor at Harvard, 100.
STOWELL, LORD,
Judge of the Court of Admiralty, 1798-1828, 676.
Prize law, work in creation of, 694.
STRANGE, JOHN,
career of, 130-132.
Master of the Rolls, 1750-1754, 245.
STUBBS (W.) AND TALMASH (G.),
Crown Circuit Companion, 353, 354.
SUGDEN, SIR E. B.,
his book on Powers, 382.
SULIVAN, R. J.,
Thoughts on Martial Law, 630.
SULLIVAN, F. S.,
Historical Treatise of the Feudal Law and Constitutional Laws of England, 342, 343.
SWINBURNE, H.,
Briefe Treatise of Testaments and last Willes, 619.

T

TALBOT, LORD,
Lord Chancellor, 1733-1737, 214-218.
career of, 214-216.
judgments, 216-218.
TALMASH (G.),
see Stubbs (W.).
TAXATION,
Jacob's *Laws of Taxation*, 347.
TAYLOR, JOHN,
career of, 644.
Elements of the Civil Law, 644.

TEMPLE CHURCH,
changes in, 33.
TENURES,
books on, 369, 370.
THAVY'S INN,
attached to Lincoln's Inn, 41, 42 *n.*, 44.
THOMSON, WILLIAM,
Baron of the Exchequer, 1729-1739, 460.
Solicitor-General, 1717-1720, 460.
THURLOW, LORD,
Arden, R. P., dislike of, 327, 328, 329.
Attorney-General, 1771-1778, 317.
character of, 314-317.
decisions, 323-327.
dismissal of, 320.
Divorce bill in Lords, support of decisive, 321, 322.
downfall, cause of, 319.
Equity, part in development of, 323.
Grafton, Duke of, reply to, 318 *n.*
Hargrave, reliance on, 322, 323.
Hastings, Warren, defence of, 319, 320.
intractable temper of, 315, 321.
Johnson, Dr., relations with, 319, 320.
legal knowledge, 322.
Lord Chancellor, 1778-1782, 318, 319.
Pitt, strained relations with, 320.
restraint upon anticipation invented by, 325.
Shelley's case, doctrine of, 323.
Solicitor-General, 1770-1771, 317.
TITHES,
books on law of, 620, 621.
cases relating to, 690.
TOLERATION ACT,
Blackstone's views on Dr. Furneaux's criticism of, 714.
TOLLER, SIR SAMUEL,
Law of Executors and Administrators, 620.
TOMLINS, SIR T. E.,
Law of Wills and Codicils, etc., 395, 396.
TOOKE, HORNE,
prosecution for seditious libel, 317.
TORT,
Actions on the Case for Torts, 391.
criminal conversation, actions for, 523.
decisions on law of, 521-524.
seduction, actions for, 523.
trespass, accidental and involuntary act, 524.
trover and trespass, 521, 522.
TRADE MARKS,
cases as to, 283, 284.
TREASON,
tracts on, 362, 363.
TREASURY,
junior Counsel to the, 11.
Solicitor to the, 11, 12, 13.
TREATIES,
collection of, government publication, 409.
Utrecht, 447.
TREMAINE, SIR JOHN,
Placita Coronae; or Pleas of the Crown (Rice's collection of Precedents relating to), 363.
TRESPASS,
accidental and involuntary act, 524.
trover and, 521, 522.
TREVOR, JOHN,
Master of the Rolls, 1693-1717, 218, 219.
TREVOR, THOMAS,
Chief Justice of the C.P., 1701-1714, 447, 448.
TROTT, NICHOLAS (Chief Justice of South Carolina),
Laws of the British Plantations and America relating to the Church, etc., 349.
TROVER,
trespass and, 521, 522.
TRUMBULL, SIR WILLIAM,
career and character of, 661, 662.
denounced by Pepys, 661.
France, envoy to, 661.
Judge Advocate of the fleet, 661.
TRUST,
charitable, 271.
mediæval use and; Mansfield's analysis, 586.
modern and mediæval use, distinction between, 302, 303.
TWISS, SIR TRAVERS,
Eldon, Lord, not responsible for court delays and defects in procedure, 294.

U

UMFREVILLE, EDWARD,
Lex Coronatoria, 336.
USES,
Gilbert's *Uses and Trusts*, 187, 368.
USURY,
books on law of, 397, 398.
UTRECHT, TREATY OF,
peers created in order to carry treaty through House of Lords, 447.

V

VATTEL, E. DE,
Les Droit des Gens, 633, 634, 635, 636.
translation of, 638.

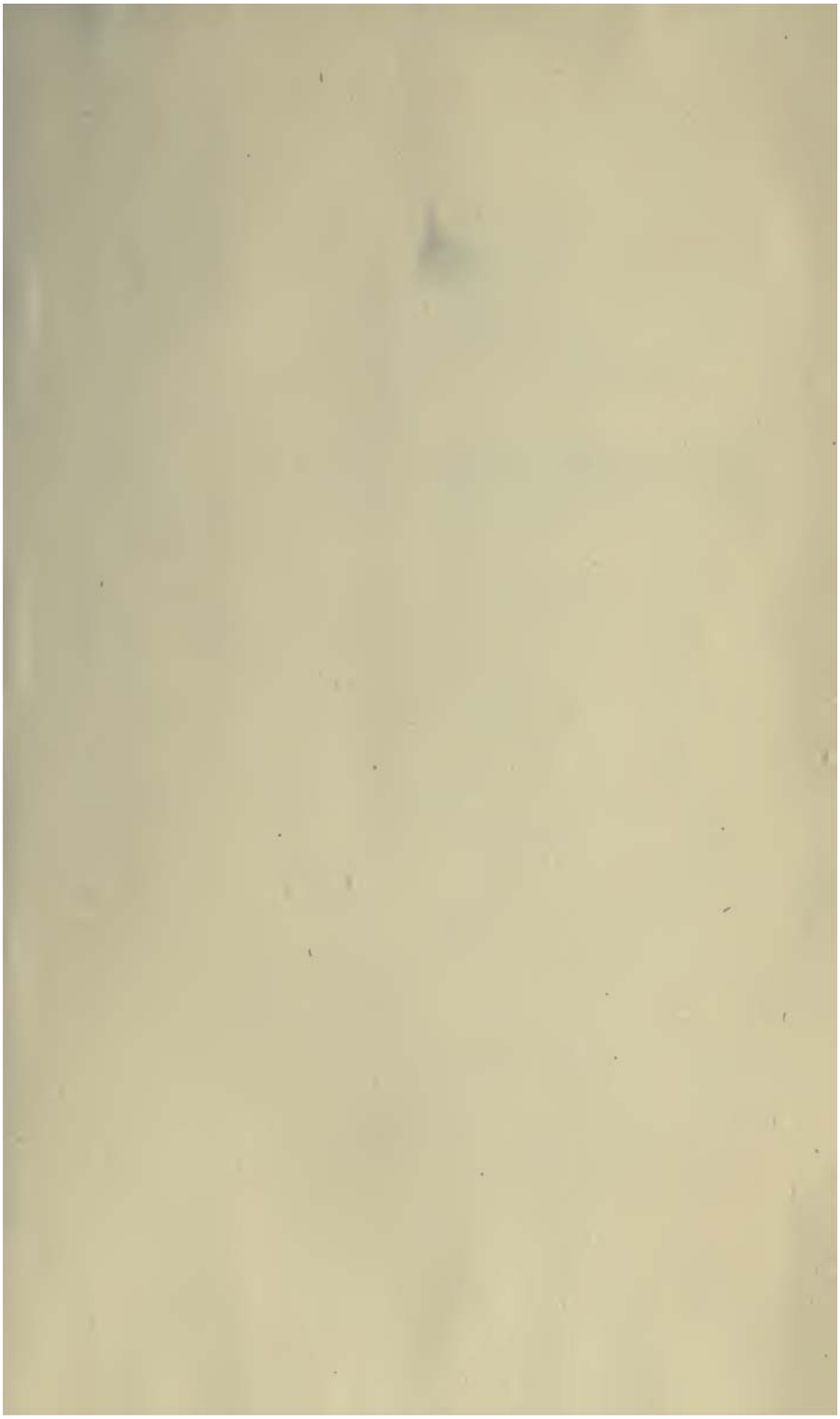
VERNEY, JOHN,
Master of the Rolls, 1738-1741, 245.
VINER, CHARLES,
career of, 164.
foundation of Vinerian law professorship at Oxford, 92, 93.
will, clauses relating to Oxford University, *Appendix*, 739.
VINERIAN PROFESSORSHIP,
establishment of, *Appendix*, 739, 750.
VINER'S ABRIDGMENT,
publication of, 163-168, 178.

W

WAGERS,
legal and illegal, 520, 521.
WALLACE, JAMES,
Attorney-General, 1780-1783, 564.
career of, 563, 564.
Solicitor-General, 1778-1780, 564.
WALLACE, J. W.,
Eldon, Lord, his influence on reporting, 145.
WALSINGHAM, LORD,
see De Grey, William,
WAR,
books on laws of, 635, 636.
capture of enemy property on neutral ships, 638.
WARD, EDWARD,
Chief Baron, 1695-1714, 455.
WARD, ROBERT,
Enquiry into the Foundations and History of the Law of Nations in Europe, 638, 639.
WATSON, W.,
The Clergyman's Law, 622.
WEARG, SIR CLEMENT,
Solicitor-General, 1724-1727, 460.
WEDDERBURN, ALEXANDER,
see Loughborough, Lord.
WELCH, SAUNDERS,
Observations on the Office of Constable, 336.
WENTWORTH, JOHN,
A Complete System of Pleading, 359.
WESKETT, JOHN,
Complete Digest of the Theory, Laws and Practice of Insurance, 386.
WESTBURY, LORD,
Law and Equity, on, 602 *n*.
WICQUEFORT, A. DE,
L'Ambassadeur et ses fonctions, (translation by John Digby), 637.
WILKES, JOHN,
outlawry, reversal of: Mansfield's judgment, 552.
WILKINS, PROFESSOR,
Concilia of the English Church, 403.
WILLES, EDWARD,
decisions, 486.
judge of the King's Bench, 1768-1787, 486.
WILLES, JOHN,
Chief Justice of the C.P., 1737-1760, 132, 447, 448.
career of, 132.
decisions of, 133, 449, 451.
reports, 132.
WILLS,
Andrews v. *Powys*; complicated jurisdiction, 695.
books on, 395, 396.
testamentary causes, 686-689.
WILLS ACT, 1837,
effects of, 515.
provisions of, 667, 689.
WILMOT, JOHN EARDLEY,
Chief Justice of the C.P., 1766-1771, 480.
decisions of, 481, 482.
Judge of the King's Bench, 1755-1766, 478, 479, 480.
WISEMAN, SIR ROBERT,
The Law of Laws, 640.
WITNESSES,
see Evidence.
WOLFF,
Institutiones juris naturae et Gentium, 632, 633, 635, 636.
Jus naturae Methodo scientifico pertractatum, 632, 633, 635.
WOMEN,
books on law relating to, 399.
WOOD, EDWARD,
A Compleat Body of Conveyancing, 376, 377.
WOOD, THOMAS,
career of, 418, 419.
works by,
Institute of the Laws of England, 418, 419, 427.
New Institute of the Imperial or Civil Law, 425, 426, 427.
Treatise of the First Principles of Laws in General, 427, 428.
WOODDESON, RICHARD,
career of, 420.
works by,
Elements of Jurisprudence, 428, 429
Systematical View of the Laws of England, 420, 421.
WRECK,
supposed rule as to forfeiture, 534.
WRIGHT, LORD KEEPER,
account of, 194.
decisions of, 194.
WRIGHT, MARTIN, J.,
Introduction to the Law of Tenures, 369, 370, 429.

WYNNE, EDWARD,
career of, 421, 422.
decisions, authority of, 155.
Eunomus, account of, 420, 421, 422, 423, 425.
law tracts, collection of, 421, 422.
WYNNE, SERJEANT WILLIAM,
essays of, 422.

Y

YATES, JOSEPH,
Common Pleas, removal to in 1770, 482, 483.
decisions, 483, 484.
Judge of the King's Bench, 1764-1770, 482, 483.
Junius's statements as to, 482, 483.
YEAR BOOKS,
authority of the, 147, 157, 159.
YORKE, CHARLES,
brilliant career of, 310, 311.
Law of Forfeiture for High Treason, 362, 363.
Lord Chancellorship, acceptance of, 312.
death three days after, 312.
Lord Northington's rudeness to, 311 *n*.
YORKE, P. C.,
Hardwicke, Lord, life of, written by, 294.
YORKE, PHILIP,
see Hardwicke, Lord.
YORKSHIRE REGISTRY ACT,
defects in, 379, 380.

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